NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Diana Hynek 10/12/2005
Departmental Paperwork Clearance Officer
Office of the Chief Information Officer
14th and Constitution Ave. NW.
Room 6625
Washington, DC 20230

In accordance with the Paperwork Reduction Act, OMB has taken the following action on your request for approval of a revision of an information collection received on 07/21/2005.

TITLE: NMFS Alaska Region Vessel Monitoring System (VMS) Program

AGENCY FORM NUMBER(S): None

ACTION : APPROVED WITH CHANGE
OMB NO.: 0648-0445
EXPIRATION DATE: 10/31/2006

BURDEN:	RESPONSES	HOURS	COSTS($,000)
Previous	7,418,718	14,992	653
New	10,656,269	23,882	1,145
Difference	3,237,551	8,890	492
Program Change		8,890	492
Adjustment		0	0

TERMS OF CLEARANCE:
This collection is approved for one year, during which time the agency is required to request a full three-year clearance using the normal procedures not associated with proposed or final rules. In addition, the Terms of Clearance associated with the approval of 2/28/2005 under this OMB Control Number still apply.

OMB Authorizing Official	Title
Donald R. Arbuckle	Deputy Administrator, Office of Information and Regulatory Affairs

PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

1. Agency/Subagency originating request
DOC/NOAA/NMFS

2. OMB control number b. [ ] None
a. 0648 - 0445

3. Type of information collection (*check one*)
a. [ ] New Collection
b. [✔] Revision of a currently approved collection
c. [ ] Extension of a currently approved collection
d. [ ] Reinstatement, without change, of a previously approved collection for which approval has expired
e. [ ] Reinstatement, with change, of a previously approved collection for which approval has expired
f. [ ] Existing collection in use without an OMB control number
For b-f, note Item A2 of Supporting Statement instructions

4. Type of review requested (*check one*)
a. [✔] Regular submission
b. [ ] Emergency - Approval requested by ____/____/____
c. [ ] Delegated

5. Small entities
Will this information collection have a significant economic impact on a substantial number of small entities? [ ] Yes [✔] No

6. Requested expiration date
a. [✔] Three years from approval date b. [ ] Other Specify: ____/____

7. Title
NMFS Alaska Region Vessel Monitoring System (VMS) Program

8. Agency form number(s) (*if applicable*)

9. Keywords

10. Abstract

NMFS Alaska Region requires use of the VMS when fishing under certain conditions in the following fisheries: Atka Mackerel, Pollock, Pacific Cod, BSAI Crab, essential fish habitat (EFH) and habitat areas of particular concern (HAPC) in the Aleutian Islands and Gulf of Alaska. This collection-of-information addresses the VMS requirements. A vessel is required to have onboard an operating NMFS-approved VMS transmitter at any time under specified conditions. These transmitters automatically determine the vessel's location several times per hour using Global Positioning System (GPS) satellites and send the position information to NMFS via a mobile communication service provider.

11. Affected public (*Mark primary with "P" and all others that apply with "x"*)
a. x Individuals or households d. ___ Farms
b. P Business or other for-profit e. ___ Federal Government
c. ___ Not-for-profit institutions f. ___ State, Local or Tribal Government

12. Obligation to respond (*check one*)
a. [ ] Voluntary
b. [✔] Required to obtain or retain benefits
c. [ ] Mandatory

13. Annual recordkeeping and reporting burden

a. Number of respondents	1,854
b. Total annual responses	10,656,269
1. Percentage of these responses collected electronically	98 %
c. Total annual hours requested	23,882
d. Current OMB inventory	14,992
e. Difference	8,890
f. Explanation of difference	
1. Program change	8,890
2. Adjustment	

14. Annual reporting and recordkeeping cost burden *(in thousands of dollars)*

a. Total annualized capital/startup costs	403
b. Total annual costs (O&M)	742
c. Total annualized cost requested	1145
d. Current OMB inventory	653
e. Difference	492
f. Explanation of difference	
1. Program change	492
2. Adjustment	

15. Purpose of information collection (*Mark primary with "P" and all others that apply with "X"*)
a. x Application for benefits e. ___ Program planning or management
b. ___ Program evaluation f. ___ Research
c. ___ General purpose statistics g. P Regulatory or compliance
d. ___ Audit

16. Frequency of recordkeeping or reporting *(check all that apply)*
a. [ ] Recordkeeping b. [ ] Third party disclosure
c. [✔] Reporting
1. [✔] On occasion 2. [ ] Weekly 3. [ ] Monthly
4. [ ] Quarterly 5. [ ] Semi-annually 6. [ ] Annually
7. [ ] Biennially 8. [ ] Other (describe) ____

17. Statistical methods
Does this information collection employ statistical methods
[ ] Yes [✔] No

18. Agency Contact (person who can best answer questions regarding the content of this submission)
Name: Patsy A. Bearden
Phone: (907) 586-7008

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

(a) It is necessary for the proper performance of agency functions;

(b) It avoids unnecessary duplication;

(c) It reduces burden on small entities;

(d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;

(e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;

(f) It indicates the retention period for recordkeeping requirements;

(g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):

(i) Why the information is being collected;

(ii) Use of information;

(iii) Burden estimate;

(iv) Nature of response (voluntary, required for a benefit, mandatory);

(v) Nature and extent of confidentiality; and

(vi) Need to display currently valid OMB control number;

(h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);

(i) It uses effective and efficient statistical survey methodology; and

(j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee	Date

Agency Certification (signature of Assistant Administrator, Deputy Assistant Administrator, Line Office Chief Information Officer, head of MB staff for L.O.s, or of the Director of a Program or StaffOffice)	
Signature signed by Alan Risenhoover	Date 07/06/2005
Signature of NOAA Clearance Officer	
Signature signed by Ira M. Grossman	Date 07/07/2005

SUPPORTING STATEMENT
NMFS ALASKA REGION VESSEL MONITORING SYSTEM (VMS) PROGRAM
OMB CONTROL NO.: 0648-0445

INTRODUCTION

The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801, *et seq*. (Magnuson-Stevens Act) authorizes the North Pacific Fishery Management Council (Council) to prepare and amend fishery management plans for any fishery in waters under its jurisdiction. Beginning with the passage of the Magnuson-Stevens Act, the Secretary of Commerce (Secretary) has undertaken a set of objectives for the conservation and management of marine fishery resources. Under this stewardship role of one of the Nation's natural resources, the Secretary was given certain regulatory authorities to ensure the most beneficial uses of these resources. One of the regulatory steps taken to carry out the conservation and management objectives is the requirement for use of a Vessel Monitoring System (VMS) for certain users of the resources.

A. JUSTIFICATION

1. Explain the circumstances that make the collection of information necessary.

Participants in certain fisheries are required to purchase, install, and operate a National Marine Fisheries Service (NMFS) approved VMS under certain circumstances to provide more precise information on vessel location. The VMS transmitter automatically determines the vessels position several times per hour using Global Positioning System (GPS) satellite. A communications service provider receives the transmission and relays it to NMFS. The VMS transmitters are designed to be tamper- resistant and automatic. In most cases, the vessel owner is unaware of exactly when the unit is transmitting and is unable to alter the signal or the time of transmission.

Atka Mackerel, Pollock, and Pacific Cod.

NMFS has management responsibility for certain threatened and endangered species, including Steller sea lions, under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531, *et seq*., and the authority to promulgate regulations to enforce provisions of the ESA to protect such species. To help ascertain the effects on the endangered Steller sea lions caused by the pollock, Atka mackerel, and Pacific cod directed fisheries in the Bering Sea and Aleutian Islands (BSAI) Management Area and Gulf of Alaska (GOA), NMFS needs to identify where vessels engaged on those fisheries are fishing. Most of the Atka mackerel, pollock, and Pacific cod are harvested in or near critical habitat in the BSAI and GOA. When critical habitat areas are closed, continued fishing for the three species takes place very close or adjacent to closed areas. Effective enforcement depends on the use of a VMS to accurately monitor vessels fishing near critical habitat when these areas are closed.

BSAI Crab.

A vessel that harvests crab in the BSAI crab fisheries, including a vessel harvesting Western

Alaska Community Development Quota (CDQ) Program or Adak crab allocations, are required to have onboard an operating NMFS-approved VMS transmitter at any time when the vessel has crab gear on board. Under a quota-based management, vessel owners have a strong incentive to misreport quantity of crab harvested. The use of VMS helps to identify fishing and delivery locations, thereby assisting in the prevention of unauthorized or unreported landings.

EFH participants (added with this action)

In the groundfish, crab, scallop, and salmon fisheries in the exclusive economic zone (EEZ) off Alaska, protection measures are identified and authorized for essential fish habitat (EFH) and habitat areas of particular concern (HAPC). Tracking the location of fishing vessels by VMS is necessary for effective enforcement of the EFH and HAPC management measures. Many of the proposed fishing restrictions involve relatively small areas dispersed over a large section of the EEZ, making surveillance by enforcement vessels or aviation patrols difficult with existing resources. Therefore, VMS is required for:

● All federally permitted vessels operating in the Aleutian Islands subarea.
If the vessel is in port, it is considered operating during loading or offloading of fish, fish products, or gear.

● All federally permitted vessels operating in the GOA with bottom contact gear on board.
Several gear types used in the Alaska fisheries have been identified as likely to disturb bottom habitat and would be restricted by this action to protect EFH and HAPCs. These gear types include pot, hook-and-line, dredge, dinglebar troll, and nonpelagic trawl gears.

VMS transmission allows the tracking of a vessel at those times when the vessel is conducting fishing activities in or near an EFH or HAPC management area, or is capable of conducting such activities in the near future.

BSAI sablefish fishery participants (added with this action).

This action adds VMS requirements for BSAI sablefish fishery participants to address possible misreporting in the BSAI by harvesters fishing in the western GOA. Misreporting is occurring possibly due to increasing killer whale depredation of hooked sablefish, increased costs of traveling for fishermen to the BSAI, and relatively low catch rates of sablefish in the BSAI. Anecdotal accounts suggest that participants in the BSAI sablefish areas are fishing in the Western GOA in an effort to avoid killer whales, which could result in misreporting of sablefish harvests. Industry also cites higher prices paid for sablefish taken in the GOA than in the BSAI as another reason for potential misreporting. To the extent that misreporting is occurring, sablefish biomass estimates would be affected, which would impact the total sablefish allowable biological catch (ABC) or quotas. The vessel VMS transmitter must be transmitting while fishing for sablefish in the Bering Sea (BS) or Aleutian Islands (AI) management area and until all sablefish caught in any of these areas is landed.

2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines.

VMS units are integrated GPS and communications unit coupled with an antenna or antennas on top of the vessel. Newer VMS units are typically about the size of a car radio. The VMS system is an essential component of managing fisheries, because it allows verification of where fishing is taking place (real time). This, in turn, allows verification that vessels fishing in an area are permitted to fish in that area. The VMS also ensures that harvested fish are properly debited or reported, because NMFS can track vessels as they arrive in port to offload product.

The VMS units originally approved for use to help enforce the Steller sea lion protection measures are no longer approved for new participants. Current users may continue to use these units, but if they need a replacement unit, they must obtain a different, NMFS-approved VMS unit. Approved vendors offer different packages. For example, one firm offers VMS units ranging in list price from $1,550 to $2,500 plus freight, while other VMS units offered by other firms start at $1,200. Transmission costs are priced from $2.40 to $3.36 per day.

a. VMS operation

Prior to participation in a fishery that requires VMS, a vessel owner must purchase a NMFS-approved VMS transmitter and install it or have it installed onboard the vessel. Installation time for a VMS unit is estimated to be less than two hours, but a higher estimate of 6 hours/vessel is used, based on a worst-case scenario where a suitable electrical hookup is not convenient to a location where the VMS unit can be installed.

The VMS transmitter must be available for inspection by NMFS personnel, observers, or authorized officers. The vessel owner must ensure that the VMS transmitter is not tampered with, disabled, destroyed, or operated improperly; and must pay all charges levied by the communication service provider.

VMS must be operating whenever the boat is operating, which includes transiting, fishing, offloading and backloading.

This action adds 806 participants that require VMS units on their vessels.

VMS operation, Respondent	
Number of VMS respondents (806 NEW + 1048 EXISTING) Atka mackerel, pollock, Pacific cod (539) (already have VMS) BSAI crab (200) (already have VMS) AI EFH (71) (124 total; 53 already have VMS) GOA EFH (635) (865 total; 230 already have VMS) BSAI sablefish (100) (126 total, 26 already have VMS)	**1854**
Total responses (VMS transmissions) VMS = 72 transmissions per fishing day Atka mackerel, pollock, Pacific cod (539) 180 fishing days per vessel x 72 x 539 = 6,985,440 BSAI crab (200) 30 fishing days per vessel x 72 x 200 = 432,000 AI EFH (124) 20 fishing days per vessel x 72 x 124 = 178,560 GOA EFH (865) 20 fishing days per vessel x 72 x 865 = 1,245,600 BS & AI sablefish (126) 200 fishing days per vessel x 72 x 126 = 1,814,400	**10,656,000**
Total VMS burden: Time for each transmission is 5 sec 10,656,000 x 5 = 53,280,000/3600 sec = 14,800 hr	
VMS installation time for each NEW VMS (6 hr one time charge) x 806 vessels=4836/3 year = 1612 hr	
VMS maintenance time (4 hr/yr x 1854 vessels =7416 hr)	
Total burden (14,800 + 1612 + 7416) **Total personnel cost** $25 x (1612 + 7416) **Total miscellaneous cost** Initial cost of VMS units ($1,500 x 806=1,209,000/3 yr= $403,000)	**23,828 hr** **$225,700** **$1,143,000**
VMS transmission cost @ $5/day = 740,000) Atka mackerel, pollock, Pacific cod (539) 180 fishing days per vessel x $5/day x 539 = 485100 BSAI crab (200) 30 fishing days per vessel x $5/day x 200 = 30000 AI EFH (124) 20 fishing days per vessel x $5/day x 124 = 12400 GOA EFH (865) 20 fishing days per vessel x $5/day x 865 = 86500 BS & AI sablefish (126) 200 fishing days per vessel x $5/day x 126 = 126000	

VMS operation, Federal Government	
Total burden hours	**7488**
Full time = 80 hr per time period	
26 time periods per year	
26 x 80 = 2080 hr	
Enforcement (3 full time x 2080 = 6240)	
1 program manager @ $33	
1 information technology technician @ $27	
1 enforcement technician $25	
Inseason Management (4 part time = 1248 hr)	
1 fisheries technician @ 15% = .15 x 2080 = 312 hr	
1 scales technician @ 10% = .10 x 2080 = 208 hr	
1 fisheries technician @ 20% = .2 x 2080 = 416 hr	
1 fisheries technician @ 15% = .15 x 2080 = 312 hr	
Total personnel cost	**$36400**
1 fisheries technician@ $34/hr x 312 = 10608	
1 scales technician@ $29/hr x 208 = 6032	
1 fisheries technician@ $28/hr x 416 = 11648	
1 fisheries technician@ $26/hr x 312 = 8112	
Total miscellaneous cost	
1 contract VMS technician @ $80,000/yr	**$80000**

b. VMS check-in report

Upon completion of purchase and installation of the VMS units, and within 72 hours before participation in a fishery, the participant must submit by FAX to National Oceanic and Atmospheric Administration (NOAA) Fisheries Office for Law Enforcement (OLE) a VMS check-in report. The information on this report enables OLE to verify that the VMS system is functioning and that VMS data are being received. Upon receipt and approval, OLE will issue the participant a VMS confirmation number.

OLE informs the vessel operator if the VMS stops transmitting and, therefore, if the vessel must stop fishing. Anytime a VMS unit is replaced or moved from one vessel to another (as may happen with companies that own multiple vessels), the operator must submit another VMS check-in report.

A VMS check-in report consists of the following:

VMS Check-in Report

Date
Vessel name
U.S. Coast Guard documentation number
Federal Fisheries Permit number or Federal Crab Fishing Permit
Contact person name and telephone number
VMS transmitter serial number

VMS check-in report, Respondent	
Number of respondents (NEW: 71 + 635 + 100 = 806)	**806**
Atka mackerel, pollock, Pacific cod (539) (already have VMS)	
BSAI crab (200) (already have VMS)	
AI EFH (71) (124 total; 53 already have VMS)	

GOA EFH (635) (865 total; 230 already have VMS) BS & AI sablefish (100) 100 (126 total, 26 already have VMS) **Total responses** (1 x 806/3 yr) Frequency of check-in responses = 1 **Total burden hours** Hours per response (12/60 min=0.2 hr) 0.2 x 806 = 161.2. 161.2/3 yr = 53.73 **Total personnel cost** ($25 x 54) **Total miscellaneous costs (**FAX $6 x 806= 4836) 4836/3 yr = 1612	**269** **54** **$2901** **$1612**

VMS check-in report, Federal Government	
Total responses	**806**
Total burden hours (0.2 x 806)	**161 hr**
Total personnel cost (161 hr x $25/hr)	**$4025**

It is anticipated that the information collected will be disseminated to the public or used to support publicly disseminated information. As explained in the following paragraphs, the information gathered has utility. NOAA Fisheries will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response #10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Prior to dissemination, the information will be subjected to quality control measures and a pre-dissemination review pursuant to Section 515 of Public Law 106-554.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

The VMS information collection is automated. An Internet data entry form for the VMS check-in report will be accomplished by NMFS in the near future.

4. Describe efforts to identify duplication.

None of the information collected as part of this information collection duplicates other collections. This information collection is part of a specialized and technical program that is not like any other.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

This collection-of-information does not impose a significant impact on small entities.

6. Describe the consequences to Federal program or policy activities if the collection is not conducted or is conducted less frequently.

Without VMS, NMFS is not able to enforce complex boundaries surrounding numerous areas closed to transit or directed fishing. Failure to enforce regulations associated with these areas

would adversely impact endangered Steller sea lion populations and exacerbate impacts on essential fish habitats. Without VMS, monitoring capabilities in quota based fisheries such as rationalized crab and sablefish, NMFS anticipates that the incidence of misreporting, underreporting and other forms of deliberate data fouling would increase. Such increases could adversely impact NMFS ability to develop accurate stock assessments and could also directly impact stocks through increased potential for overfishing.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with the OMB guidelines.

There are no inconsistencies.

8. Provide a copy of the PRA Federal Register notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Coincidentally with this Paperwork Reduction Act (PRA) renewal, two separate rules will be published. The EFH requirements, including VMS, for fishery participants will be presented in proposed and final rules in 2005 [EFH Amendments to the Alaska Region (AKR) Fishery Management Plan (FMP), (RIN 0648-AT09) Amendments 65/78 to BSAI FMP; Amendments 65/73 to GOA FMP; Amendments 12/16 to KTC FMP, Amendments 7/8 to Scallop FMP; and Amendments 7/8 to Salmon FMP would implement EFH and HAPC provisions. This action is under court order and time frames for implementation.]

VMS requirements for participants in BS and AI sablefish fisheries will be presented in proposed and final rules in 2005 [RIN: 0648-AS84, Fisheries of the Exclusive Economic Zone Off Alaska; Individual Fishing Quota Program; Community Development Quota Program].

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

No payment or gift to respondents is provided under this program.

10. Describe any assurance of confidentiality provided to respondents and the basis for this assurance in statute, regulation, or agency policy.

NMFS, OLE, and the United States Coast Guard (USCG) have worked to ensure the confidentiality of all VMS transmissions, and all VMS units include systems to minimize the risk of direct or inadvertent disclosure of vessel position.

The VMS transmissions are considered confidential and are subject to confidentiality protection under section 402(b) of the Magnuson-Stevens Act. They are also confidential under NOAA Administrative Order 216-100, which sets forth procedures to protect confidentiality of fishery statistics.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

This information collection does not involve information of a sensitive nature.

12. Provide an estimate in hours of the burden of the collection of information.

The total estimated respondents: 1,854 up from 739. The total estimated responses: 10,656,269, up from 7,418,718. The total estimated burden hours: 23,882, up from 14,992. Total estimated personnel costs: $228,601, down from $ 277,432.

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in #12 above).

Total estimated miscellaneous costs: $1,144,612, up from $653,000.

14. Provide estimates of annualized cost to the Federal government.

Total estimated burden hours: 7,649, up from 40. Total estimated personnel costs: $40,425, up from $1,000. Total miscellaneous costs: $80,000, up from 0.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB 83-I.

Program changes resulting in a net increase of burden hours requested:
1) Extending the requirement to operate and transmit a VMS unit under certain conditions to submit a check-in report to participants of the AI and GOA EFH Programs and BS and AI sablefish fisheries, adding 806 respondents and 8,890 hours for VMS installation and operation.

2) Changing the VMS check-in report requirement for participants to submit a one-time check-in report at the time of VMS installation instead of an annual VMS check-in report, thus eliminating current respondents' hours for the check-in, and keeping new respondents' hours to an annualized time of 4 minutes, rather than 12 minutes.

Program changes resulting in a net increase of miscellaneous costs requested:
1) Adding new respondents resulted in an increase of $363,000 in capital/start-up costs for purchase and installation of VMS units, $127,388 for transmission costs and $1602 for the one-time check-in report.

2) Changing the annual check-in to a one-time only check-in requirement led to a decrease of $4,434 in the operating and maintenance costs for the current respondents.

16. For collections whose results will be published, outline the plans for tabulation and publication.

No plans exist for publishing the results of the information collection that are discussed above.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

In accordance with OMB requirements, the control number and expiration date of OMB approval are shown on the VMS check-in report. The transmission of the VMS data is automatic and electronic, and therefore not possible to display the OMB expiration date.

18. Explain each exception to the certification statement identified in Item 19 of the OMB 83-I.

There are no exceptions to the certification statement.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection does not employ statistical methods.

OMB Control No.: 0648-0445
Expiration Date: mm/dd/yyyy

PACIFIC STATES MARINE FISHERIES COMMISSION
612 West Willoughby Avenue, Suite B
Juneau, AK 99801
Tel: (907) 586-8244 Fax: (907) 586-8247

Request for VMS Transmitter Reimbursement

BLOCK A. GENERAL INFORMATION	
1. Vessel Name:	2. Federal Fisheries Permit Number:
3. Address	4. Owner Name:
	5. VMS transmitter ID #
	6. Telephone Number:

BLOCK B. SIGNATURE		
Under Penalties of perjury, I hereby declare that I, the undersigned, completed this application and the information contained herein is true, correct, and complete to the best of my knowledge. I also declare that the VMS transmitter described above has been installed on board the vessel listed above and is intended for use on that vessel.		
Applicant Name (please print or type)	Signature	Date

BLOCK C. CHECKLIST

In order to receive a reimbursement check, you must certify all of the following:

- ☐ The unit has been activated and you have received confirmation from enforcement that it is transmitting
- ☐ NMFS has issued your vessel a Federal Fisheries Permit endorsed for Pacific cod, Atka mackerel or pollock.
- ☐ You have attached proof of purchase for the VMS transmitter

Public Reporting Burden Statement

Public reporting burden for this collection of information is estimated to average 0.2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802 (Attn: Lori Gravel-Duval).

Additional Information

Before completing this form please note the following: 1) NMFS cannot conduct or sponsor this information request, and you are not required to respond to this information request, unless the form displays a currently valid OMB control number; 2) this information is being used to manage the VMS data collection program for groundfish fisheries; 3) Federal law and regulations require and authorize NMFS to manage commercial fishing effort.

OMB Control No.: 0648-0445
Expiration Date: mm/dd/yyyy

Please fax this completed form to:
NOAA Fisheries Office For Law Enforcement
VMS Fax number: ***907-586-7703***

NOAA/NMFS
Office for Law Enforcement

VMS Fax

Note: Please register your VMS unit with an approved service provider prior to using this fax.

Date:_____

Vessel Name:_____

Coast Guard DOC#:_____

Federal Fisheries Permit #:_____
or
Federal Crab Vessel permit#:_____

Contact Person:_____

Contact Telephone:_____

Inmarsat IMN:_____
or
Skymate Serial #:_____
or
ESL Serial #:_____

PUBLIC REPORTING BURDEN STATEMENT

Public reporting burden for this collection of information is estimated to average 0.2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802 (Attn: Lori Durall).

ADDITIONAL INFORMATION

Before completing this form please note the following: 1) NMFS cannot conduct or sponsor this information request, and you are not required to respond to this information request, unless the form displays a currently valid OMB control number; 2) This information is mandatory and is required to manage the VMS data collection program for groundfish under 50 CFR part 679 and CR crab fisheries under 50 CFR part 680, and under section 402(a) of the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq*.) and 16 U.S.C. 1862(j) ; 3) Federal law and regulations require and authorize NMFS to manage commercial fishing effort; 4) Responses to this information request are not confidential.

the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred.

PART 1150—CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

3. The authority citation for part 1150 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 49 U.S.C. 721(a), 10502, 10901 and 10902.

4. Section 1150.32 is amended by adding a new paragraph (e) to read as follows:

§ 1150.32 Procedures and relevant dates—transactions that involve creation of Class III carriers.

* * * * *

(e) If the projected annual revenue of the carrier to be created by a transaction under this exemption exceeds $5 million, applicant must, at least 60 days before the exemption becomes effective, post a notice of intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so.

5. Section 1150.35 is amended by revising paragraph (a) to read as follows:

§ 1150.35 Procedures and relevant dates—transactions that involve creation of Class I or Class II carriers.

(a) To qualify for this exemption, applicant must serve a notice of intent to file a notice of exemption no later than 14 days before the notice of exemption is filed with the Board, and applicant must comply with the notice requirement of § 1150.32(e).

* * * * *

6. Section 1150.42 is amended by adding a new paragraph (e) to read as follows:

§ 1150.42 Procedures and relevant dates for small line acquisitions.

* * * * *

(e) If the projected annual revenue of the rail lines to be acquired or operated, together with the acquiring carrier's projected annual revenue, exceeds $5 million, the applicant must, at least 60 days before the exemption becomes effective, post a notice of applicant's intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so.

7. Section 1150.45 is amended by revising paragraph (a) to read as follows:

§ 1150.45 Procedures and relevant dates-transactions under section 10902 that involve creation of Class I or Class II rail carriers.

(a) To qualify for this exemption, applicant must serve a notice of intent to file a notice of exemption no later than 14 days before the notice of exemption is filed with the Board, and applicant must comply with the notice requirement of § 1150.42(e).

* * * * *

[FR Doc. 97–23827 Filed 9–9–97; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 970527125–7219–02; I.D. 032797B]

RIN 0648–AJ95

Magnuson Act Provisions; Appointment of Regional Fishery Management Council Members

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to amend the regulations governing the nomination and appointment of members of regional fishery management councils to establish the procedures applicable to the nomination and appointment to the Pacific Fishery Management Council of a representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho. The purpose of this rule is to implement certain sections of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) as amended by the Sustainable Fisheries Act (SFA) which require such an appointment.

EFFECTIVE DATE: September 5, 1997.

ADDRESSES: Comments on the collection of information aspects of this rule should be sent to Mr. William Stelle, Jr., Administrator, Northwest Region, NMFS, 76000 Sand Point Way, BIN C15700, Seattle, WA 98115–0070; or to Mr. William Hogarth, Acting Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206–526–6142 or Rodney McInnis at 562–980–4040.

SUPPLEMENTARY INFORMATION: On October 11, 1996, President Clinton signed into law the Sustainable Fisheries Act, which, in pertinent part, amended the Magnuson-Stevens Act to add a seat on the Pacific Fishery Management Council (Pacific Council) exclusively for a representative of an Indian tribe with federally recognized fishing rights:

> The Secretary shall appoint to the Pacific Council one representative of an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho from a list of not less than 3 individuals submitted by the tribal governments. The Secretary, in consultation with the Secretary of the Interior and tribal governments, shall establish by regulation the procedure for submitting a list under this subparagraph (section 302(b)(5)(A)).

Sections 302(b)(5)(B)(i), (ii), and (iii) of the Magnuson-Stevens Act require that representation be rotated among the tribes taking into consideration the qualifications of the individuals on the list, the various rights of the Indian tribes involved and judicial cases that set out how those rights are to be exercised, and the geographic area in which the tribe of the representative is located.

NMFS published a proposed rule to implement these provisions of the Magnuson-Stevens Act with a 30-day comment period on July 1, 1997 (62 FR 35468). The comment period was subsequently extended through August 11, 1997, at the request of the Quileute Tribal Council.

As in the proposed rule, the final rule requires the Secretary of Commerce (Secretary) to consult with the Bureau of Indian Affairs (BIA), Department of the Interior, to determine from which Indian tribes to solicit nominations for the Council seat. By statute, NMFS must solicit nominees from those Indian tribes with federally recognized fishing rights from California, Oregon, Washington, or Idaho. The rule requires the Secretary to solicit written nominations from each tribal government and produce a list of not less than three individuals who are

knowledgeable and experienced regarding the fishery resources affected by the recommendations of the Pacific Council. The Secretary will appoint one individual from this list to the Pacific Council for a term of 3 years. Under the rule, prior service on the Council in a different capacity will not disqualify a nominee proposed by a tribal government. Also, if any tribal representative appointed to the Council vacates the Council seat prior to the expiration of any term, the Secretary may appoint a replacement for the remainder of the vacant term from the original list of nominees or may solicit a new set of nominees following the process described above. Under the rule, no tribal representative may serve more than three consecutive terms in the Indian tribal seat.

The rule requires the Secretary to rotate the appointment of a tribal representative to the Pacific Council among the tribes, taking into consideration the qualifications of the individuals nominated, the various rights of the Indian tribes involved and judicial cases that set out how those rights are to be exercised, and the geographic area in which the tribe of the representative is located.

Comments and Responses

NMFS received five letters from tribal organizations commenting on the proposed rule. Two letters were received from the Quileute Tribal Council and one letter each from the Hoh Tribe, the Quinault Indian Nation and the Columbia River Inter-Tribal Fish Commission (CRITFC) representing the four Columbia River Treaty Tribes (Yakama, Warm Springs, Umatilla and Nez Perce). These comments and NMFS' responses are summarized below.

Comment 1: NMFS did not adequately consult with tribal governments, as required by the Magnuson-Stevens Act, before preparing the proposed rule. The CRITFC suggested that final regulations not be implemented until that deficiency is cured by NMFS.

Response: NMFS needed to act quickly to implement procedures to appoint a tribal member to the Council in order to have a tribal representative appointed and seated on the Council for the very important September and November 1997 Council meetings. At these Council meetings, decisions will be made regarding harvestable amounts of Pacific groundfish that will directly affect tribal harvests. NMFS staff consulted informally with the staffs of the CRITFC, Northwest Indian Fisheries Commission (NWIFC), and the Yurok and Hoopa Valley Tribes prior to publication of the proposed rule. NMFS did not formally send the proposed rule to each individual tribal government until after the rule was published for public comment. After the rule was published, it was sent to each individual tribal government to solicit comment during the comment period. At the request of the Quileute Tribe, the comment period was extended until August 11, 1997, to provide additional time for tribal governments to comment. NMFS is publishing the final rule without further delay in order to implement the new provisions for the appointment of a tribal member to the Council before the September Pacific Council meeting.

Comment 2: Both the CRITFC and Quileute Tribal Council commented that the appointment of a tribal member to the Council should be rotated among the three tribal regions (*U.S.* v. *Washington* tribes, the Columbia River-*U.S.* v. *Oregon* and Idaho tribes, and the California tribes). The Quileute stated that the Secretary ''shall'' rotate the appointment every three years, and proposed that no tribal representative may serve more than one term. CRITFC commented only that it was their expectation that the ''appointments would rotate among the three Regions.'' The Quinault opposed the required rotation among the three areas every three years and the one-term limit.

Response: The Magnuson-Stevens Act, section 302(b)(5)(B), states only that ''Representation shall be rotated among the tribes taking into consideration—(i) the qualifications of the individuals on the list referred to in subparagraph (A), (ii) the various rights of the Indian tribes involved and judicial cases that set forth how those rights are to be exercised, and (iii) the geographic area in which the tribe of the representative is located.'' Although not specifically identifying the areas/regions or tribes among which the appointment shall be rotated, the statute provides the Secretary with the discretion to rotate the appointment among the three regions identified by the two commentators. In addition, as pointed out by the Quinault Indian Nation, requiring rotation of the Council seat each 3 years and limiting the tribal representative to one term appears inconsistent with the provision of the Act that limits the number of times a single individual can hold a Council seat to three consecutive terms. The three term limitation implicitly recognizes the value of experience gained by longer term service. In addition, the statute lists two additional criteria the Secretary must take into account when rotating the seat: The qualifications of the nominees and the rights of the tribes. Therefore, the regulations use the plain language of the statute in the belief that Congress wanted the Secretary to have some discretion in rotating the appointments consistent with the guidance contained in the statute. If Congress had intended the appointment to rotate among three specific regions without exception, the statutory language would have been more specific. *Comment 3:* Both the CRITFC and the Quileute Tribal Council proposed modification of the NMFS-proposed process for appointing a tribal member to the Council. This modification would add an additional step to the process where, after NMFS has solicited initial nominations from each individual tribal government, NMFS would send the list of nominees back to each tribal government so that the tribes could select a preferred nominee from each of the three regions. The Quileute proposal suggested that each tribe would vote for one of the nominees in its area. The Secretary would be required to make the Council appointment from a list of the three nominees with the most votes from each area. The nominees with the most votes from the other two areas would serve as alternates. The CRITFC proposal was similar to the Quileute proposal but not as detailed. CRITFC suggested the same process by which NMFS would return the list of nominees to the tribal governments for them to choose a preferred nominee from each area, but CRITFC would expect the Secretary to ''defer to the tribes in each respective area where there is a consensus on their nominee.'' CRITFC also suggested that the BIA should provide to the NMFS a list of tribes with federally recognized rights and contacts at that tribe, and that the list be provided to each tribe on the list.

Response: NMFS believes the idea of providing the list of nominees to the affected Indian tribes is worth further consideration and intends to consult further with the tribes regarding a process by which all of the affected Indian tribes might have an opportunity to comment on the list of nominees. NMFS notes, however, that the tribes have the ability to consult among themselves primarily through the Inter-Tribal fish commissions (Northwest Indian Fish Commission and CRITFC) at the time that nominations are initially solicited. Thus, the tribes from each area initially could coordinate the nomination of a single individual without the need for coordination through NMFS. While NMFS believes this is a suggestion worth exploring for the long term, its consideration should not hold up the promulgation of a final

rule governing the appointment for the upcoming term while NMFS further explores this proposal. Consequently, NMFS is adopting the process as proposed in the proposed rule but will formally consult with each Indian tribe with federally recognized fishing rights, from which nominations were initially solicited, regarding the consultation process proposed by the Quileute and CRITFC. If, after consultation with all of the tribes, NMFS determines that a different process should be adopted for the future, NMFS will amend this regulation. Regardless of what process is selected for consulting with the tribes, NMFS cannot adopt a rule whereby the Secretary would be bound by a vote among the tribes, as suggested by the Quileute comments. Such a rule would eliminate the Secretary's discretion in making appointments and the Secretary's ability to take into account the statutory criteria discussed above in response to comment 2. The Secretary will, however, take into account the breadth of support from other tribes when selecting the tribal Council member.

Comment 4: The Quileute, the Hoh, and CRITFC all suggested that the regulations should provide for regional ''alternates'' or ''designees.'' The designees would be allowed to occupy the Council seat and vote on matters primarily affecting the region that they represent. The Quinault agreed this was a good idea, but acknowledged the statute probably does not permit this.

Response: The Magnuson-Stevens Act includes as voting members of Council the state director or designee and the NMFS Regional Director or designee. For all other council members, the statute does not authorize voting by designees. Without statutory authorization NMFS cannot provide the ability for ''designees'' to vote.

Comment 5: The Quileute Tribe commented that prior service by a tribal member who has served three consecutive terms on the Council, in a position where the tribal member was nominated by a State Governor to fill one of the State Council seats, should disqualify the individual for appointment to the Tribal Council seat. The Quinault Indian Nation commented that the three-term prohibition applies to three terms in the same Council seat and that the proposed rule correctly interprets the SFA.

Response: NMFS agrees with the Quinault Indian Nation comment. In the proposed rule NMFS states that prior service will not disqualify a nominee proposed by a tribal government from serving in the newly-created tribal seat. Thus, the three-term consecutive limit prohibition applies to service time in the new Council seat that Congress established specifically to represent tribal governments. Prior service in a state governor-nominated Council seat does not disqualify a tribal government's nominee for the newly established tribal Council seat.

Classification

Since this rule is procedural or interpretative in its entirety, under 5 U.S.C. 553(d) it is not subject to a 30-day delay in effectiveness date.

This final rule has been determined to be not significant for purposes of E.O. 12866.

Because prior notice and opportunity for public comment is not required for this rule by 5 U.S.C. 553 or by any other law, under 5 U.S.C. 603(a) and 604(a) this rule is not subject to the analytical requirements of the Regulatory Flexibility Act.

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA). The reporting burden for Indian tribal government nominations for the Council appointments is estimated to average 120 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection-of-information subject to the PRA, unless that collection-of-information displays a currently valid OMB control number. The collection of this information has been approved by the OMB under Control Number 0648–0314. Send comments on the collection of information aspects of this rule to the NMFS Northwest or Southwest Regional Administrators (see **ADDRESSES**) or to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attention: NOAA Desk Officer).

List of Subjects in 50 CFR Part 600

Administrative practice and procedure, Fisheries, Fishing, Intergovernmental relations.

Dated: September 4, 1997.

David L. Evans,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 600 is amended as follows:

PART 600—MAGNUSON ACT PROVISIONS

1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

2. In § 600.215, the introductory text is removed, paragraphs (a) through (g) are redesignated as paragraphs (a)(1) through (a)(7) respectively, paragraphs (c)(1) through (c)(6) are redesignated as paragraphs (a)(3)(i) through (a)(3)(vi) respectively, paragraphs (f)(1) and (f)(2) are redesignated (a)(6)(i) and (a)(6)(ii) respectively, paragraphs (g)(1) through (g)(6) are redesignated (a)(7)(i) through (a)(7)(vi) respectively, and paragraphs (a) introductory text and (b) are added to read as follows:

§ 600.215 Appointments.

(a) *Members appointed from Governors' lists.* This paragraph applies to council members selected by the Secretary from lists submitted by Governors pursuant to section 302(b)(2)(C) of the Magnuson-Stevens Act.

* * * * *

(b) *Tribal Member.* This paragraph applies to the selection of the Pacific Fishery Management Council's tribal member as required by section 302(b)(5) of the Magnuson-Stevens Act.

(1) The Secretary shall appoint to the Pacific Fishery Management Council one representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho from a list of not less than three individuals submitted by the tribal Governments.

(2) The Secretary shall solicit nominations of individuals for the list referred to in paragraph (b)(1) of this section only from those Indian tribes with federally recognized fishing rights from California, Oregon, Washington, or Idaho. The Secretary will consult with the Bureau of Indian Affairs, Department of the Interior, to determine which Indian tribes may submit nominations.

(3) To assist in assessing the qualifications of each nominee, each tribal government must furnish to the NMFS Office of Sustainable Fisheries a current resume, or equivalent, describing the nominee's qualifications with emphasis on knowledge and experience related to the fishery resources affected by recommendations of the Pacific Council. Prior service on the Council in a different capacity will not disqualify nominees proposed by tribal governments.

(4) Nominations must be provided to NMFS by March 15 of the year in which

the term of the current tribal member expires.

(5) The Secretary shall rotate the appointment among the tribes taking into consideration:

(i) The qualifications of the individuals on the list referred to in paragraph (b)(1) of this section.

(ii) The various rights of the Indian tribes involved and judicial cases that set out how those rights are to be exercised.

(iii) The geographic area in which the tribe of the representative is located.

(iv) No tribal representative shall serve more than three consecutive terms in the Indian tribal seat.

(6) Any vacancy occurring prior to the expiration of any term shall be filled in the same manner as described above except that the Secretary may use the list referred to in paragraph (b)(1) of this section from which the vacating member was chosen.

* * * * *

[FR Doc. 97–23940 Filed 9–5–97; 10:40 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket Number; 970903221–7221–01; I.D. 081297C]

RIN 0648–XX89

Fisheries off West Coast States and in the Western Pacific; Precious Corals Fisheries; Technical Amendment

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the regulations implementing the Fishery Management Plan for Precious Corals Fisheries of the Western Pacific Region (FMP) which were published in the **Federal Register** on July 2, 1996. This amendment corrects the coordinates for the location of the Makapuu bed of precious corals appearing under the category of ''Established beds'' in the definition of ''Precious coral permit area''.

DATES: Effective September 10, 1997.

FOR FURTHER INFORMATION CONTACT: Svein Fougner, 562–980–4034; or Alvin Katekaru, 808–973–2985.

SUPPLEMENTARY INFORMATION: In the original FMP the coordinates for the center of the Makapuu bed contained a typographical error. Instead of the longitude being listed as 157° 32.5' W. it was incorrectly listed as 157° 35.5' W. longitude. This error placed the location of the bed approximately three miles away from its actual location.

There has been almost no fishing under the FMP since its implementation, and this error was only recently discovered. This technical amendment corrects the regulations implementing the FMP (August 30, 1983, 48 FR 3923; consolidated by July 2, 1996, 61 FR 34570) to list the coordinates for the center of the Makapuu bed.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), under 5 U.S.C. 553(b)(B) finds that providing prior notice and an opportunity for public comment on this rule is unnecessary, because the rule merely corrects coordinates for the location of a resource, and such notice and opportunity for comment would serve no useful purpose. Similarly, the AA, under 5 U.S.C. 553 (d)(3) finds that delaying the effective date of the correction for 30 days is unnecessary because the location of the bed is fixed.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq*., are inapplicable. This rule is exempt from review under E.O. 12866.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indians, Reporting and recordkeeping requirements, Administrative practice and procedure, American Samoa, Guam, Hawaiian Natives, Northern Mariana Islands.

Dated: September 4, 1997.

David L. Evans,

Deputy Assistant Administrator for Fisheries,National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR Part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES AND THE WESTERN PACIFIC

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 660.12, the category for'' *Established beds* ''under the definition of ''*Precious coral permit area*'' is corrected by revising the coordinates of the point specified therein to read ''21° 18.0' N. lat, 157° 32.5' W. long.''

[FR Doc. 97–23941 Filed 9-9-97; 8:45 am]

BILLING CODE 3510–22–F

relieved by making the final harvest specifications effective on publication.

Under the provisions of 5 U.S.C. 553(d)(3), an agency can waive a delay in the effective date for good cause found and published with the rule. For all other fisheries not currently closed because the interim TACs were reached, the likely possibility exists for their closures prior to the expiration of a 30-day delayed effectiveness period because their interim TACs or PSC allowances could be reached. Determining which fisheries may close is impossible because these fisheries are affected by several factors that cannot be predicted in advance, including fishing effort, weather, movement of fishery stocks, and market price. Furthermore, the closure of one fishery has a cascading effect on other fisheries by freeing-up fishing vessels, allowing them to move from closed fisheries to open ones, increasing the fishing capacity in those open fisheries and causing them to close at an accelerated pace. The interim harvest specifications currently in effect are not sufficient to allow directed fisheries to continue predictably, resulting in unnecessary closures and disruption within the fishing industry and the potential for regulatory discards. The final harvest specifications establish increased TACs and PSC allowances to provide continued directed fishing for species that would otherwise be prohibited under the interim harvest specifications. These final harvest specifications were developed as quickly a possible, given Plan Team review in November 2004, Council consideration and recommendations in December 2004, and NOAA fisheris review and development in January–February 2005. Additionally, if the final harvest specifications are not effective by February 27, 2005, which is the start of the Pacific halibut season as specified by the IPHC, the longline sablefish fishery will not begin concurrently with the Pacific halibut season. This would cause sablefish that is caught with Pacific halibut to be discarded, as both longline sablefish and Pacific halibut are managed under the same IFQ program. These final harvest specifications were developed as quickly as possible, given plan team review in November 2004, Council consideration and recommendations in December 2004, and NMFS review and development in January through February 2005.

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*; 16 U.S.C. 1540(f); Pub. L. 105–277, Title II of Division C; Pub L. 106–31, Sec. 3027; and Pub L. 106–554, Sec. 209.

Dated: February 17, 2005.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 05–3581 Filed 2–23–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126332–5039–02; I.D. 112204A]

Fisheries of the Exclusive Economic Zone off Alaska; Bering Sea and Aleutian Islands; 2005 and 2006 Final Harvest Specifications for Groundfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: 2005 and 2006 final harvest specifications for groundfish; apportionment of reserves; closures.

SUMMARY: NMFS announces 2005 and 2006 final harvest specifications and prohibited species catch (PSC) allowances for the groundfish fishery of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to establish harvest limits for groundfish during the 2005 and 2006 fishing years and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The intended effect of this action is to conserve and manage the groundfish resources in the BSAI in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: The 2005 and 2006 final harvest specifications and associated apportionment of reserves are effective at 1200 hrs, Alaska local time (A.l.t.), February 24, 2005 through 2400 hrs, A.l.t., December 31, 2006.

ADDRESSES: Copies of the Final Environmental Assessment (EA) and Final Regulatory Flexibility Analysis (FRFA) prepared for this action are available from Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Durall or from the Alaska Region Web site at *http://www.fakr.noaa.gov.* Copies of the final 2004 Stock Assessment and Fishery Evaluation (SAFE) report for the groundfish resources of the BSAI, dated November 2004, are available from the North Pacific Fishery Management Council (Council), West 4th Avenue, Suite 306, Anchorage, AK 99510–2252 (907–271–2809) or from its Web site at *http://www.fakr.noaa.gov/npfmc.*

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907–586–7228 or e-mail *mary.furuness@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Federal regulations at 50 CFR part 679 implement the FMP and govern the groundfish fisheries in the BSAI. The Council prepared the FMP, and NMFS approved it under the Magnuson-Stevens Act. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

The FMP and its implementing regulations require NMFS, after consultation with the Council, to specify annually the total allowable catch (TAC) for each target species and for the ''other species'' category, the sum of which must be within the optimum yield range of 1.4 million to 2.0 million metric tons (mt) (see § 679.20(a)(1)(i)). Also specified are apportionments of TACs, and Community Development Quota (CDQ) reserve amounts, PSC allowances, and prohibited species quota (PSQ) reserve amounts. Regulations at § 679.20(c)(3) further require NMFS to consider public comment on the proposed annual TACs and apportionments thereof and the proposed PSC allowances, and to publish final harvest specifications in the **Federal Register**. The final harvest specifications set forth in Tables 1 through 17 of this action satisfy these requirements. For 2005 and 2006, the sum of TACs for each year is 2 million mt.

The 2005 and 2006 proposed harvest specifications and PSC allowances for the groundfish fishery of the BSAI were published in the **Federal Register** on December 8, 2004 (69 FR 70974). Comments were invited and accepted through January 7, 2005. NMFS received three letters of comment on the proposed harvest specifications. These letters of comment are summarized and responded to in the Response to Comments section. NMFS consulted with the Council during the December 2004 Council meeting in Anchorage, AK. After considering public comments, as well as biological and economic data that were available at the Council's December meeting, NMFS is implementing the 2005 and 2006 final harvest specifications as recommended by the Council.

Regulations at § 679.20(c)(2)(ii) establish the interim amounts of each

proposed initial TAC (ITAC) and allocations thereof, of each CDQ reserve established by § 679.20(b)(1)(iii), and of the proposed PSC allowances and PSQ reserves established by § 679.21 that become available at 0001 hours, A.l.t., January 1, and remain available until superseded by the final harvest specifications. NMFS published the 2005 interim harvest specifications in the **Federal Register** on December 23, 2004 (69 FR 76870). Regulations at § 679.20(c)(2)(ii) do not provide for an interim harvest specification for either the hook-and-line or pot gear sablefish CDQ reserve or for sablefish managed under the Individual Fishing Quota (IFQ) program. The 2005 final harvest specifications, PSC allowances and PSQ reserves contained in this action supersede the 2005 interim harvest specifications.

Acceptable Biological Catch (ABC) and TAC Harvest Specifications

The final ABC levels are based on the best available biological and socioeconomic information, including projected biomass trends, information on assumed distribution of stock biomass, and revised technical methods used to calculate stock biomass. In general, the development of ABCs and overfishing levels (OFLs) involves sophisticated statistical analyses of fish populations and is based on a successive series of six levels, or tiers, of reliable information available to fishery scientists. Tier one represents the highest data quality and tier six the lowest level of data quality available.

In December 2004, the Scientific and Statistical Committee (SSC), Advisory Panel (AP), and Council reviewed current biological information about the condition of groundfish stocks in the BSAI. This information was compiled by the Council's Plan Team and is presented in the final 2004 SAFE report for the BSAI groundfish fisheries, dated November 2004. The SAFE report contains a review of the latest scientific analyses and estimates of each species' biomass and other biological parameters, as well as summaries of the available information on the BSAI ecosystem and the economic condition of groundfish fisheries off Alaska. The SAFE report is available for public review (see **ADDRESSES**). From these data and analyses, the Plan Team estimates an ABC for each species or species category.

In December 2004, the SSC, AP, and Council reviewed the Plan Team's recommendations. Except for pollock, atka mackerel, rock sole, and the ''other species'' category, the SSC, AP, and Council endorsed the Plan Team's ABC recommendations. For the 2006 OFL and ABC recommendations for Atka mackerel, rock sole and Bering Sea pollock the SSC used a downward revised projection of catch that results in higher OFLs and ABCs. For Aleutian Islands pollock, the SSC recommended using tier 5 management that calculates a lower ABC than the Plan Team's recommendation using tier 3 management. For Bogoslof pollock, the SSC recommended using a procedure that reduces the ABC proportionately to the ratio of current stock biomass to target stock biomass. For ''other species'', the SSC recommended using tier 6 management for the sharks and octopus species, that calculated lower ABCs, instead of the Plan Team's recommended tier 5 management. The Plan Team also recommended separate OFLs and ABCs for the species in the ''other species'' category, however, the current FMP specifies management at the group level. Since 1999, the SSC has recommended a procedure that moves gradually to a higher ABC for ''other species'' over a 10-year period instead of a large increase in one year. The 2005 and 2006 ABC amounts reflect the 7th and 8th years incremental increase in the ABC for ''other species.'' For all species, the AP endorsed the ABCs recommended by the SSC, and the Council adopted them.

The final TAC recommendations were based on the ABCs as adjusted for other biological and socioeconomic considerations, including maintaining the total TAC within the required optimum yield (OY) range of 1.4 million to 2.0 million mt. The Council adopted the AP's 2005 and 2006 TAC recommendations, except for the 2005 rock sole, flathead sole, ''other flatfish'', yellowfin sole, Alaska plaice, Bering Sea pollock and''other species''category. The Council increased TAC amounts for rock sole, flathead sole, ''other flatfish'' by 500 mt each and the yellowfin sole TAC by 3,200 mt. It decreased the Bering Sea subarea pollock TAC by 2,500 mt, the Alaska plaice TAC by 2,000 mt, and the ''other species'' TAC by 200 mt. None of the Council's recommended TACs for 2005 or 2006 exceed the final 2005 or 2006 ABC for any species category. NMFS finds that the recommended OFLs, ABCs, and TACs are consistent with the biological condition of groundfish stocks as described in the 2004 SAFE report that was approved by the Council.

Other Rules Affecting the 2005 and 2006 Harvest Specifications

Amendments 48/48 to the FMP and to the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA) were approved by NMFS on October 12, 2004. The final rule implementing Amendments 48/48 was published November 8, 2004, (69 FR 64683). Amendments 48/48 revise the administrative process used to establish annual specifications for the groundfish fisheries of the GOA and the BSAI. The goals of Amendments 48/48 in revising the harvest specifications process are to (1) manage fisheries based on the best scientific information available, (2) provide for adequate prior public review and comment on Council recommendations, (3) provide for additional opportunity for Secretarial review, (4) minimize unnecessary disruption to fisheries and public confusion, and (5) promote administrative efficiency.

Based on the approval of Amendments 48/48, the Council recommended 2005 and 2006 final harvest specifications for BSAI groundfish. The 2006 harvest specifications will be updated in early 2006, when final harvest specifications for 2006 and new harvest specifications for 2007 are implemented.

In June 2004, the Council adopted Amendment 82 to the FMP. This amendment would establish a program for management of the Aleutian Islands (AI) directed pollock fishery. Section 803 of the Consolidated Appropriations Act of 2004 (CAA), Public Law (Pub. L.) No. 108–199, requires the AI directed pollock fishery to be allocated to the Aleut Corporation for economic development in Adak, Alaska. Prior to the CAA, the AI directed pollock fishery was managed pursuant to the American Fisheries Act (AFA), Pub. L. No. 105–277, Title II of Division C. The AFA allocated the AI directed pollock fishery to specific harvesters and processors named in the AFA. The CAA supersedes that portion of the AFA. Together, the CAA and the AFA effectively allocated the AI directed pollock fishery to the Aleut Corporation after subtraction of the CDQ directed fishing allowance and incidental catch allowance (ICA) from the AI pollock TAC. The implementation of section 803 of the CAA requires amending AFA provisions in the FMP and in the regulations at 50 CFR part 679. This would be accomplished by Amendment 82 which was approved by the Secretary of Commerce on February 9, 2005.

Until the regulations for Amendment 82 are effective, NMFS will prohibit the non-CDQ AI directed pollock fishery in the final harvest specifications for 2005 and 2006 based on statutory language of section 803 of the CAA. The AI pollock TAC recommended by the Council under provisions of proposed

Amendment 82 are included in the 2005 and 2006 final harvest specifications to allow the Administrator, Alaska Region, NMFS, (Regional Administrator), to open the AI directed pollock fishery if and when the regulations for Amendment 82 are effective. As stated above, this prohibition is authorized by section 803 of the CAA, which prohibits fishing or processing of any part of the AI non-CDQ pollock allocation except with permission of the Aleut Corporation or its designated agent. For additional information, see the November 16, 2004, notice of availability (69 FR 67107) and the December 7, 2004, proposed rule for Amendment 82 (69 FR 70589).

Changes From the 2005 and 2006 Proposed Harvest Specifications in the BSAI

In October 2004, the Council's recommendations for the 2005 and 2006 proposed harvest specifications (69 FR 70974, December 8, 2004) were based largely upon information contained in the final 2003 SAFE report for the BSAI groundfish fisheries, dated November 2003. The Council recommended that OFLs and ABCs for stocks in tiers 1 through 3 be based on biomass projections as set forth in the 2003 SAFE report and estimates of groundfish harvests through the 2004 fishing year. For stocks in tiers 4 through 6, for which projections could not be made, the Council recommended that OFL and ABC levels be unchanged from 2004 until the final 2004 SAFE report could be completed. The final 2004 SAFE report (dated November 2004), which was not available when the Council made its recommendations in October 2004, contains the best and most recent scientific information on the condition of the groundfish stocks and was considered in December by the Council in making its recommendations for the 2005 and 2006 final harvest specifications. Based on the final 2004 SAFE report, the sum of the 2005 recommended final TACs for the BSAI (2,000,000 mt) is the same as the sum of the 2005 proposed TACs. The sum of the 2006 recommended final TACs for the BSAI (2,000,000 mt) is 1,577 mt higher than the 2006 proposed TACs (1,998,423 mt). This represents a .08-percent increase overall. Those species for which the final 2005 TAC is lower than the proposed 2005 TAC are Bogoslof pollock (decreased to 10 mt from 50 mt), Pacific cod (decreased to 206,000 mt from 215,952 mt), AI sablefish (decreased to 2,620 mt from 2,790 mt), Alaska plaice (decreased to 8,000 mt from 10,000 mt), and AI ''other rockfish'' (decreased to 590 mt from 634 mt). Those species for which the final 2005 TAC is higher than the proposed 2005 TAC are Bering Sea pollock (increased to 1,478,500 from 1,474,450 mt), Bering Sea sablefish (increased to 2,440 mt from 2,418 mt), rock sole (increased to 41,500 mt from 41,450 mt), flathead sole (increased to 19,500 mt from 19,000 mt), ''other flatfish'' (increased to 3,500 mt from 3,000 mt), yellowfin sole (increased to 90,686 mt from 86,075 mt), Pacific ocean perch (increased to 12,600 mt from 12,020 mt), shortraker rockfish (increased to 596 mt from 526 mt), rougheye rockfish (increased to 223 from 195 mt), and ''other species'' (increased to 29,000 mt from 27,205 mt). Those species for which the final 2006 TAC is lower than the proposed 2006 TAC are Bogoslof pollock (decreased to 10 mt from 50 mt), Pacific cod (decreased to 195,000 mt from 215,500 mt), AI sablefish (decreased to 2,480 mt from 2,589 mt), Bering Sea greenland turbot (decreased to 2,500 mt from 2,700 mt), and AI ''other rockfish'' (decreased to 590 mt from 634). Those species for which the final 2006 TAC is higher than the proposed 2006 TAC are Bering Sea pollock (increased to 1,487,756 from 1,474,000 mt), Bering Sea sablefish (increased to 2,310 mt from 2,244 mt), rock sole (increased to 42,000 mt from 41,000 mt), flathead sole (increased to 20,000 mt from 19,000 mt), yellowfin sole (increased to 90,000 mt from 86,075 mt), Pacific ocean perch (increased to 12,600 mt from 12,170 mt), shortraker rockfish (increased to 596 mt from 526 mt), rougheye rockfish (increased to 223 from 195 mt), and ''other species'' (increased to 29,200 mt from 27,205 mt). As mentioned in the 2005 and 2006 proposed harvest specifications, NMFS is apportioning the amounts shown in Table 2 from the non-specified reserve to increase the ITAC of several target species.

The 2005 and 2006 final TAC recommendations for the BSAI are within the OY range established for the BSAI and do not exceed ABCs for any single species/complexes. Compared to the 2005 proposed harvest specifications, the Council's 2005 final TAC recommendations increase fishing opportunities for fishermen and economic benefits to the nation for species for which the Council had sufficient information to raise TAC levels. These include Bering Sea pollock, Bering Sea sablefish, yellowfin sole, AI Pacific ocean perch, shortraker rockfish, rougheye rockfish, and ''other species.'' Conversely, the Council reduced TAC levels to provide greater protection for several species, these include Bogoslof pollock, Pacific cod, AI sablefish, Bering Sea Pacific ocean perch, AI ''other rockfish.'' The changes recommended by the Council were based on the best scientific information available, consistent with National Standard 2 of the Magnuson-Stevens Act, and within a reasonable range of variation from the proposed TAC recommendations so that the affected public was fairly apprized and could have made meaningful comments.

Table 1 lists the 2005 and 2006 final OFL, ABC, TAC, ITAC and CDQ reserve amounts of groundfish in the BSAI. The apportionment of TAC amounts among fisheries and seasons is discussed below.

TABLE 1.—2005 AND 2006 OVERFISHING LEVEL (OFL), ACCEPTABLE BIOLOGICAL CATCH (ABC), TOTAL ALLOWABLE CATCH (TAC), INITIAL TAC (ITAC), AND CDQ RESERVE ALLOCATION OF GROUNDFISH IN THE BSAI.[1]

[Amounts are in metric tons]

Species	Area	2005					2006				
		OFL	ABC	TAC	ITAC[2]	CDQ[3]	OFL	ABC	TAC	ITAC[2]	CDQ[3]
Pollock[4]	BS[2]	2,100,000	1,960,000	1,478,500	1,330,650	147,850	1,944,000	1,617,000	1,487,756	1,338,980	148,776
	AI[2]	39,100	29,400	19,000	17,100	1,900	39,100	29,400	19,000	17,100	1,900
	Bogoslof	39,600	2,570	10	10	.....	39,600	2,570	10	10	.....
Pacific cod	BSAI	265,000	206,000	206,000	175,100	15,450	226,000	195,000	195,000	165,750	14,625
Sablefish[5]	BS	2,950	2,440	2,440	2,013	336	2,690	2,310	2,310	982	87
	AI	3,170	2,620	2,620	2,129	442	2,880	2,480	2,480	527	47
Atka mackerel	BSAI	147,000	124,000	63,000	53,550	4,725	127,000	107,000	63,000	53,550	4,725
	EAI/BS	.....	24,550	7,500	6,375	563	.....	21,190	7,500	6,375	563
	CAI	.....	52,830	35,500	30,175	2,663	.....	45,580	35,500	30,175	2,663
	WAI	.....	46,620	20,000	17,000	1,500	.....	40,230	20,000	17,000	1,500
Yellowfin sole	BSAI	148,000	124,000	90,686	77,083	6,801	133,000	114,000	90,000	76,500	6,750
Rock sole	BSAI	157,000	132,000	41,500	35,275	3,113	145,000	122,000	42,000	35,700	3,150
Greenland turbot	BSAI	19,200	3,930	3,500	2,975	263	11,100	3,600	3,500	2,975	263
	BS	.....	2,720	2,700	2,295	203	.....	2,500	2,500	2,125	188
	AI	.....	1,210	800	680	60	.....	1,100	1,000	850	75
Arrowtooth flounder	BSAI	132,000	108,000	12,000	10,200	900	103,000	88,400	12,000	10,200	900
Flathead sole	BSAI	70,200	58,500	19,500	16,575	1,463	56,100	48,400	20,000	17,000	1,500
Other flatfish[6]	BSAI	28,500	21,400	3,500	2,975	263	28,500	21,400	3,000	2,550	225
Alaska plaice	BSAI	237,000	189,000	8,000	6,800	600	115,000	109,000	10,000	8,500	750
Pacific ocean perch	BSAI	17,300	14,600	12,600	10,710	945	17,408	14,600	12,600	10,710	945
	BS	.....	2,920	1,400	1,190	105	.....	2,920	1,400	1,190	105
	EAI	.....	3,210	3,080	2,618	231	.....	3,210	3,080	2,618	231
	CAI	.....	3,165	3,035	2,580	228	.....	3,165	3,035	2,580	228
	WAI	.....	5,305	5,085	4,322	381	.....	5,305	5,085	4,322	381
Northern rockfish	BSAI	9,810	8,260	5,000	4,250	375	9,480	8,040	5,000	4,250	375
Shortraker rockfish	BSAI	794	596	596	507	45	794	596	596	507	45
Rougheye rockfish	BSAI	298	223	223	190	17	298	223	223	190	17
Other rockfish[7]	BSAI	1,870	1,400	1,050	893	79	1,870	1,400	1,050	893	79
	BS	.....	810	460	391	35	.....	810	460	391	35
	AI	.....	590	590	502	44	.....	590	590	502	44
Squid	BSAI	2,620	1,970	1,275	1,084	.....	2,620	1,970	1,275	1,084	.....
Other species[8]	BSAI	87,920	53,860	29,000	24,650	2,175	87,920	57,870	29,200	24,820	2,190
Total	.....	3,509,332	3,044,769	2,000,000	1,774,719	186,608	3,093,360	2,547,259	2,000,000	1,772,778	187,350

[1] These amounts apply to the entire BSAI management area unless otherwise specified. With the exception of pollock, and for the purpose of these harvest specifications, the Bering Sea (BS) subarea includes the Bogoslof District.

[2] Except for pollock and the portion of the sablefish TAC allocated to hook-and-line and pot gear, 15 percent of each TAC is put into a reserve. The ITAC for each species is the remainder of the TAC after the subtraction of these reserves.

[3] Except for pollock, squid and the hook-and-line or pot gear allocation of sablefish, one half of the amount of the TACs placed in reserve, or 7.5 percent of the TACs, is designated as a CDQ reserve for use by CDQ participants (see §§ 679.20(b)(1)(iii) and 679.31).

[4] Under § 679.20(a)(5)(i)(A)(*1*), the annual Bering Sea pollock TAC after subtraction for the CDQ directed fishing allowance—10 percent and the ICA—3.35 percent, is further allocated by sector for a directed pollock fishery as follows: inshore—50 percent; catcher/processor—40 percent; and motherships—10 percent. Under regulations that would be effective with the final rule implementing Amendment 82, the annual AI pollock TAC, after first subtracting for the CDQ directed fishing allowance—10 percent and second the ICA—2,000 mt, would be allocated to the Aleut Corporation for a directed pollock fishery.

[5] Twenty percent of the sablefish TAC allocated to hook-and-line gear or pot gear and 7.5 percent of the sablefish TAC allocated to trawl gear is reserved for use by CDQ participants (see § 679.20(b)(1)(iii)).

[6] "Other flatfish" includes all flatfish species, except for halibut (a prohibited species), flathead sole, Greenland turbot, rock sole, yellowfin sole, arrowtooth flounder and Alaska plaice.

[7] "Other rockfish" includes all *Sebastes* and *Sebastolobus* species except for Pacific ocean perch, northern, shortraker, and rougheye rockfish.

[8] "Other species" includes sculpins, sharks, skates and octopus. Forage fish, as defined at § 679.2, are not included in the "other species" category.

Reserves and the Incidental Catch Allowance (ICA) for Pollock

Regulations at § 679.20(b)(1)(i) require that 15 percent of the TAC for each target species or species group, except for pollock and the hook-and-line and pot gear allocation of sablefish, be placed in a non-specified reserve. Regulations at § 679.20(b)(1)(iii) require that one-half of each TAC amount placed in the non-specified reserve (7.5 percent), with the exception of squid, be allocated to the groundfish CDQ reserve and that 20 percent of the hook-and-line and pot gear allocation of sablefish be allocated to the fixed gear sablefish CDQ reserve. Regulations at § 679.20(a)(5)(i)(A) also require that 10 percent of the BSAI pollock TACs be allocated to the pollock CDQ directed fishing allowance. The entire Bogoslof District pollock TAC is allocated as an ICA (see § 679.20(a)(5)(ii)). With the exception of the hook-and-line and pot gear sablefish CDQ reserve, the regulations do not further apportion the CDQ reserves by gear. Regulations at § 679.21(e)(1)(i) also require that 7.5 percent of each PSC limit, with the exception of herring, be withheld as a PSQ reserve for the CDQ fisheries. Regulations governing the management of the CDQ and PSQ reserves are set forth at §§ 679.30 and 679.31.

Under regulations at § 679.20(a)(5)(i)(A)(*1*), NMFS allocates a pollock ICA of 3.35 percent of the Bering Sea subarea pollock TAC after subtraction of the 10 percent CDQ reserve. This allowance is based on an examination of the incidental catch of pollock, including CDQ vessels, in target fisheries other than pollock from 1998 through 2004. During this 6-year period, the incidental catch of pollock ranged from a low of 2 percent in 2003, to a high of 5 percent in 1999, with a 6-year average of 3 percent. Under regulations that would be effective with the final rule implementing Amendment 82, NMFS is specifying a 2,000 mt ICA for AI subarea pollock after subtraction of the 10 percent CDQ directed fishing allowance. The Aleut Corporation's directed pollock fishing allowance will be closed until regulations implementing Amendment 82 (if approved) become effective.

The regulations do not designate the remainder of the non-specified reserve by species or species group, and any amount of the reserve may be apportioned to a target species or to the ''other species'' category during the year, providing that such apportionments do not result in overfishing, see § 679.20(b)(1)(ii). The Regional Administrator has determined that the ITACs specified for the species listed in Table 2 need to be supplemented from the non-specified reserve because U.S. fishing vessels have demonstrated the capacity to catch the full TAC allocations. Therefore, in accordance with § 679.20(b)(3), NMFS is apportioning the amounts shown in Table 2 from the non-specified reserve to increase the ITAC to an amount that is equal to TAC minus the CDQ reserve.

TABLE 2.—2005 APPORTIONMENT OF RESERVES TO ITAC CATEGORIES

[Amounts are in metric tons]

Species—area or subarea	2005 reserve amount	2005 final ITAC	2006 reserve amount	2006 final ITAC
Atka mackerel—Eastern Aleutian District and Bering Sea subarea	563	6,938	563	6,938
Atka mackerel—Central Aleutian District	2,663	32,838	2,663	32,838
Atka mackerel—Western Aleutian District	1,500	18,500	1,500	18,500
Pacific ocean perch—Eastern Aleutian District	231	2,849	231	2,849
Pacific ocean perch—Central Aleutian District	228	2,808	228	2,808
Pacific ocean perch—Western Aleutian District	381	4,703	381	4,703
Pacific cod—BSAI	15,450	190,550	14,625	180,375
Shortraker rockfish-BSAI	45	552	45	552
Rougheye rockfish-BSAI	17	207	17	207
Northern rockfish-BSAI	375	4,625	375	4,625
Other rockfish—Bering Sea subarea	35	426	35	426
Total	21,488	264,996	20,663	254,821

Allocation of Pollock TAC Under the AFA

Regulations at § 679.20(a)(5)(i)(A), require, after subtracting first the 10 percent for the CDQ program and second the 3.35 percent for the ICA, the Bering Sea subarea pollock to be allocated as a directed fishing allowance (DFA) as follows: 50 percent to the inshore component, 40 percent to the catcher/processor component, and 10 percent to the mothership component. In the Bering Sea subarea, the A season, January 20—June 10, is allocated 40 percent of the DFA and the B season, June 10—November 1, is allocated 60 percent of the DFA. The AI directed pollock fishery allocation to the Aleut Corporation remains after subtracting first the 10 percent for the CDQ DFA and second the 2,000 mt for the ICA. The Aleut Corporation directed pollock fishery is closed to directed fishing until the management provisions for the AI directed pollock fishery become effective under Amendment 82. In the AI subarea, the A season is allocated 40 percent of the ABC and the B season is allocated the remainder of the directed pollock fishery. Table 3 lists these 2005 and 2006 amounts.

The regulations also contain several specific requirements concerning pollock and pollock allocations under § 679.20(a)(5)(i)(A)(*4*). First, 8.5 percent of the pollock allocated to the catcher/processor sector will be available for harvest by AFA catcher vessels with catcher/processor sector endorsements, unless the Regional Administrator receives a cooperative contract that provides for the distribution of harvest between AFA catcher/processors and AFA catcher vessels in a manner agreed to by all members. Second, AFA catcher/processors not listed in the AFA are limited to harvesting not more than 0.5 percent of the pollock allocated to the catcher/processor sector. Table 3 lists the 2005 and 2006 allocations of pollock TAC. Tables 10 through 17 list other provisions of the AFA, including inshore pollock cooperative allocations and listed catcher/processor and catcher vessel harvesting sideboard limits.

Table 3 also lists seasonal apportionments of pollock and harvest limits within the Steller Sea Lion Conservation Area (SCA). The harvest within the SCA, as defined at

§ 679.22(a)(7)(vii), is limited to 28 percent of the annual directed fishing allowance (DFA) until April 1. The remaining 12 percent of the 40 percent of the annual DFA allocated to the A season may be taken outside of the SCA before April 1 or inside the SCA after April 1. If the 28 percent of the annual DFA is not taken inside the SCA before April 1, the remainder is available to be taken inside the SCA after April 1. The A season pollock SCA harvest limit will be apportioned to each sector in proportion to each sector's allocated percentage of the DFA. Table 3 lists by sector these 2005 and 2006 amounts.

TABLE 3.—2005 AND 2006 ALLOCATIONS OF POLLOCK TACS TO THE DIRECTED POLLOCK FISHERIES AND TO THE CDQ DIRECTED FISHING ALLOWANCES (DFA) [1]

[Amounts are in metric tons]

Area and sector	2005 Allocations	2005 A season [1]		2005 B season [1]	2006 Allocations	2006 A season [1]		2006 B season [1]
		A season DFA	SCA harvest limit [2]	B season DFA		A season DFA	SCA harvest limit [2]	B season DFA
Bering Sea subarea	1,478,500				1,487,756			
CDQ DFA	147,850	59,140	41,398	88,710	148,776	59,510	41,657	89,265
ICA [1]	44,577				44,856			
AFA Inshore	643,037	257,215	180,050	385,822	647,062	258,825	181,177	388,237
AFA Catcher/Processors [3]	514,429	205,772	144,040	308,658	517,650	207,060	144,942	310,590
Catch by C/Ps	470,703	188,281		282,422	473,650	189,460		284,190
Catch by CVs [3]	43,726	17,491		26,236	44,000	17,600		26,400
Unlisted C/P Limit [4]	2,572	1,029		1,543	2,588	1,035		1,553
AFA Motherships	128,607	51,443	36,010	77,164	129,412	51,765	36,235	77,647
Excessive Harvesting Limit [5]	225,063				226,472			
Excessive Processing Limit [6]	385,822				388,237			
Total Bering Sea DFA	1,478,500	573,569	401,499	860,354	1,487,756	577,160	404,012	865,740
Aleutian Islands subarea [1]	19,000				19,000			
CDQ DFA	1,900	760		1,140	1,900	760		1,140
ICA	2,000	1,200		800	2,000	1,200		800
Aleut Corporation	15,100	9,800		5,300	15,100	9,800		5,300
Bogoslof District ICA [7]	10				10			

[1] Under § 679.20(a)(5)(i)(A), the Bering Sea subarea pollock after subtraction for the CDQ DFA—10 percent and the ICA—3.35 percent, the pollock TAC is allocated as a DFA as follows: inshore component—50 percent, catcher/processor component—40 percent, and mothership component—10 percent. In the Bering Sea subarea, the A season, January 20–June 10, is allocated 40 percent of the DFA and the B season, June 10–November 1 is allocated 60 percent of the DFA. The Aleutian Islands (AI) directed pollock fishery allocation to the Aleut Corporation remains after first subtracting for the CDQ DFA—10 percent and second the ICA—2,000 mt. The Aleut Corporation directed pollock fishery is closed to directed fishing until the management provisions for the AI directed pollock fishery become effective under Amendment 82. In the AI subarea, the A season is allocated 40 percent of the ABC and the B season is allocated the remainder of the directed pollock fishery.

[2] In the Bering Sea subarea, no more than 28 percent of each sector's annual DFA may be taken from the SCA before April 1. The remaining 12 percent of the annual DFA allocated to the A season may be taken outside of SCA before April 1 or inside the SCA after April 1. If 28 percent of the annual DFA is not taken inside the SCA before April 1, the remainder is available to be taken inside the SCA after April 1.

[3] Under § 679.20(a)(5)(i)(A)(4), not less than 8.5 percent of the DFA allocated to listed catcher/processors shall be available for harvest only by eligible catcher vessels delivering to listed catcher/processors.

[4] Under § 679.20(a)(5)(i)(A)(4)(iii), the AFA unlisted catcher/processors are limited to harvesting not more than 0.5 percent of the catcher/processors sector's allocation of pollock.

[5] Under § 679.20(a)(5)(i)(A)(6) NMFS establishes an excessive harvesting share limit equal to 17.5 percent of the sum of the pollock DFAs.

[6] Under § 679.20(a)(5)(i)(A)(7) NMFS establishes an excessive processing share limit equal to 30.0 percent of the sum of the pollock DFAs.

[7] The Bogoslof District is closed by the final harvest specifications to directed fishing for pollock. The amounts specified are for ICA only, and are not apportioned by season or sector.

Allocation of the Atka Mackerel ITAC

Under § 679.20(a)(8)(i), up to 2 percent of the Eastern Aleutian District and the Bering Sea subarea Atka mackerel ITAC may be allocated to jig gear. The amount of this allocation is determined annually by the Council based on several criteria, including the anticipated harvest capacity of the jig gear fleet. The Council recommended, and NMFS approved, a 1 percent allocation of the Atka mackerel ITAC in the Eastern Aleutian District and the Bering Sea subarea to the jig gear in 2005 and 2006. Based on an ITAC and a reserve apportionment which together total 6,938 mt, the jig gear allocation is 69 mt.

Regulations at § 679.20(a)(8)(ii)(A) apportion the Atka mackerel ITAC into two equal seasonal allowances. After subtraction of the jig gear allocation, the first seasonal allowance is made available for directed fishing from January 1 (January 20 for trawl gear) to April 15 (A season), and the second seasonal allowance is made available from September 1 to November 1 (B season) (see Table 4).

Under § 679.20(a)(8)(ii)(C)(1), the Regional Administrator will establish a harvest limit area (HLA) limit of no more than 60 percent of the seasonal TAC for the Western and Central Aleutian Districts. A lottery system is used for the HLA Atka mackerel directed fisheries to reduce the amount of daily catch in the HLA by about half and to disperse the fishery over two districts, see § 679.20(a)(8)(iii).

TABLE 4.—2005 AND 2006 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, AND CDQ RESERVE OF THE BSAI ATKA MACKEREL TAC [1]

[Amounts are in metric tons]

Subarea and component	2005 and 2006 TAC	CDQ reserve	CDQ reserve HLA limit [4]	ITAC	Seasonal allowances [2]			
					A season [3]		B season [3]	
					Total	HLA limit [4]	Total	HLA limit [4]
Western AI District	20,000	1,500	900	18,500	9,250	5,550	9,250	5,550
Central AI District	35,500	2,663	1,598	32,838	16,419	9,851	16,419	9,851
EAI/BS subarea [5]	7,500	563		6,938				
Jig (1%) [6]				69				
Other gear (99%)				6,868	3,434		3,434	
Total	63,000	4,725		58,275	29,103		29,103	

[1] Regulations at §§ 679.20(a)(8)(ii) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery.
[2] The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.
[3] The A season is January 1 (January 20 for trawl gear) to April 15 and the B season is September 1 to November 1.
[4] Harvest Limit Area (HLA) limit refers to the amount of each seasonal allowance that is available for fishing inside the HLA (see § 679.2). In 2005 and 2006, 60 percent of each seasonal allowance is available for fishing inside the HLA in the Western and Central Aleutian Districts.
[5] Eastern Aleutian District and the Bering Sea subarea.
[6] Regulations at § 679.20 (a)(8)(i) require that up to 2 percent of the Eastern Aleutian District and the Bering Sea subarea ITAC be allocated to jig gear. The amount of this allocation is 1 percent. The jig gear allocation is not apportioned by season.

Allocation of the Pacific Cod ITAC

Under § 679.20(a)(7)(i)(A), 2 percent of the Pacific cod ITAC is allocated to vessels using jig gear, 51 percent to vessels using hook-and-line or pot gear, and 47 percent to vessels using trawl gear. Under regulations at § 679.20(a)(7)(i)(B), the portion of the Pacific cod ITAC allocated to trawl gear is further allocated 50 percent to catcher vessels and 50 percent to catcher/processors. Under regulations at § 679.20(a)(7)(i)(C)(*1*), a portion of the Pacific cod ITAC allocated to hook-and-line or pot gear is set aside as an ICA of Pacific cod in directed fisheries for groundfish using these gear types. Based on anticipated incidental catch in these fisheries, the Regional Administrator specifies an ICA of 500 mt. The remainder of Pacific cod ITAC is further allocated to vessels using hook-and-line or pot gear as the following DFAs: 80 percent to hook-and-line catcher/processors, 0.3 percent to hook-and-line catcher vessels, 3.3 percent to pot catcher/processors, 15 percent to pot catcher vessels, and 1.4 percent to catcher vessels under 60 feet (18.3 m) length overall (LOA) using hook-and-line or pot gear.

Due to concerns about the potential impact of the Pacific cod fishery on Steller sea lions and their critical habitat, the apportionment of the ITAC disperses the Pacific cod fisheries into two seasonal allowances (see §§ 679.20(a)(7)(iii)(A) and 679.23(e)(5)). For pot and most hook-and-line gear, the first seasonal allowance of 60 percent of the ITAC is made available for directed fishing from January 1 to June 10, and the second seasonal allowance of 40 percent of the ITAC is made available from June 10 (September 1 for pot gear) to December 31. No seasonal harvest constraints are imposed for the Pacific cod fishery by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear. For trawl gear, the first season is January 20 to April 1 and is allocated 60 percent of the ITAC. The second season, April 1 to June 10, and the third season, June 10 to November 1, are each allocated 20 percent of the ITAC. The trawl catcher vessel allocation is further allocated as 70 percent in the first season, 10 percent in the second season and 20 percent in the third season. The trawl catcher/processor allocation is allocated 50 percent in the first season, 30 percent in the second season, and 20 percent in the third season. For jig gear, the first season and third seasons are each allocated 40 percent of the ITAC and the second season is allocated 20 percent of the ITAC. Table 5 lists the 2005 and 2006 allocations and seasonal apportionments of the Pacific cod ITAC. In accordance with §§ 679.20(a)(7)(ii)(D) and 679.20(a)(7)(iii)(B), any unused portion of a seasonal Pacific cod allowance will become available at the beginning of the next seasonal allowance.

TABLE 5.—2005 AND 2006 GEAR SHARES AND SEASONAL ALLOWANCES OF THE BSAI PACIFIC COD ITAC

[Amounts are in metric tons]

Gear sector	Percent	2005 Share of gear sector total	2005 Subtotal percentages for gear sectors	2005 Share of gear sector total	2005 Seasonal apportionment [1]		2006 Share of gear sector total	2006 Subtotal percentages for gear sectors	2006 Share of gear sector total	2006 Seasonal apportionment [1]	
					Date	Amount				Date	Amount
Total hook-and-line/pot gear.	51	97,181					91,991				
Hook-and-line/pot ICA				500					500		
Hook-and-line/pot subtotal		96,681					91,491				
Hook-and-line C/P			80	77,344	Jan 1–Jun 10	46,407		80	73,193	Jan 1–Jun 10	43,916
					Jun 10–Dec 31	30,938				Jun 10–Dec 31	29,277
Hook-and-line CV			0.3	290	Jan 1–Jun 10	174		0.3	274	Jan 1–Jun	165
					Jun 10–Dec 31	116					110
Pot C/P			3.3	3,190	Jan 1–Jun 10	1,914		3.3	3,019	Jan 1–Jun 10	1,812
					Sept 1–Dec 31	1,276				Sept 1–Dec 31	1,208
Pot CV			15	14,502	Jan 1–Jun 10	8,701		15	13,724	Jan 1–Jun 10	8,234
					Sept 1–Dec 31	5,801				Sept 1–Dec 31	5,489

TABLE 5.—2005 AND 2006 GEAR SHARES AND SEASONAL ALLOWANCES OF THE BSAI PACIFIC COD ITAC—Continued

[Amounts are in metric tons]

Gear sector	Percent	2005 Share of gear sector total	2005 Subtotoal percentages for gear sectors	2005 Share of gear sector total	2005 Seasonal apportionment [1]		2006 Share of gear sector total	2006 Subtotal percentages for gear sectors	2006 Share of gear sector total	2006 Seasonal apportionment [1]	
					Date	Amount				Date	Amount
CV < 60 feet LOA using Hook-and-line or Pot gear.	.....	.....	1.4	1,354	.....	.....	.....	1.4	1,281	.....	.....
Total Trawl Gear	47	89,559	.....	.....	.....	.....	84,776	.....	.....	.....	.....
Trawl CV	.....	.....	50	44,779	Jan 20–Apr 1	31,345	.....	50	42,388	Jan 20–Apr 1	29,672
					Apr 1–Jun10	4,478	.....	.....	.....	Apr 1–Jun 10	4,239
					Jun 10–Nov 1	8,956	.....	.....	.....	Jun 10–Nov 1	8,478
Trawl CP	.....	.....	50	44,779	Jan 20–Apr 1	22,390	.....	50	42,388	Jan 20–Apr 1	21,194
					Apr 1–Jun 10	13,434	.....	.....	.....	Apr 1–Jun 10	12,716
					Jun 10–Nov 1	8,956	.....	.....	.....	Jun 10–Nov 1	8,478
Jig	2	3,811	.....	.....	Jan 1–Apr 30	1,524	3,608	.....	.....	Jan 1–Apr 30	1,443
	.....	.....	.....	.....	Apr 30–Aug 31	762	.....	.....	.....	Apr 30–Aug 31	722
	.....	.....	.....	.....	Aug 31–Dec 31	1,524	.....	.....	.....	Aug 31–Dec 31	1,443
Total	100	190,550	.....	.....	.....	.....	180,375	.....	.....	.....	.....

[1] For most non-trawl gear the first season is allocated 60 percent of the ITAC and the second season is allocated 40 percent of the ITAC. For jig gear, the first season and third seasons are each allocated 40 percent of the ITAC and the second season is allocated 20 percent of the ITAC. No seasonal harvest constraints are imposed for the Pacific cod fishery by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear. For trawl gear, the first season is allocated 60 percent of the ITAC and the second and third seasons are each allocated 20 percent of the ITAC. The trawl catcher vessels' allocation is further allocated as 70 percent in the first season, 10 percent in the second season and 20 percent in the third season. The trawl catcher/processors' allocation is allocated 50 percent in the first season, 30 percent in the second season and 20 percent in the third season. Any unused portion of a seasonal Pacific cod allowance will be reapportioned to the next seasonal allowance.

Sablefish Gear Allocation

Regulations at § 679.20(a)(4)(iii) and (iv) require that sablefish TACs for the Bering Sea and AI subareas be allocated between trawl and hook-and-line or pot gear. Gear allocations of the TACs for the Bering Sea subarea are 50 percent for trawl gear and 50 percent for hook-and-line or pot gear and for the AI subarea are 25 percent for trawl gear and 75 percent for hook-and-line or pot gear. Regulations at § 679.20(b)(1)(iii)(B) require that 20 percent of the hook-and-line and pot gear allocation of sablefish be apportioned to the CDQ reserve. Additionally, regulations at § 679.20(b)(1)(iii)(A) require that 7.5 percent of the trawl gear allocation of sablefish (one half of the reserve) be apportioned to the CDQ reserve.

The Council recommended that specifications for the hook-and-line gear and pot gear sablefish individual fishing quota (IFQ) fisheries continue to be limited to one year to ensure that those fisheries are conducted concurrent with the halibut IFQ fishery and are based on the most recent survey information (69 FR 44634, July 27, 2004). Having the sablefish IFQ fisheries concurrent with the halibut IFQ fishery will reduce the potential for discards of halibut and sablefish in these fisheries. Because of the high value of this fishery, the Council recommended the setting of TAC be based on the most recent survey information. Under the current IFQ fishery season start date, sablefish stock assessments based on the most recent survey are available before the beginning of the fishery to allow for rulemaking each year. The sablefish IFQ fisheries remain closed at the beginning of each fishing year, until the final specifications for the sablefish IFQ fisheries are in effect. The trawl sablefish fishery will be managed using specifications for up to a two-year period, similar to GOA pollock, Pacific cod and the ''other species'' category. Table 6 specifies the 2005 and 2006 gear allocations of the sablefish TAC and CDQ reserve amounts.

TABLE 6.—2005 AND 2006 GEAR SHARES AND CDQ RESERVE OF BSAI SABLEFISH TACS

[Amounts are in metric tons]

Subarea and gear	Percent of TAC	2005 Share of TAC	2005 ITAC [1]	2005 CDQ reserve	2006 Share of TAC	2006 ITAC	2006 CDQ reserve
Bering Sea:							
Trawl [2]	50	1,220	1,037	92	1,155	982	87
Hook-and-line/pot gear [3]	50	1,220	976	244	.....	.....	.....
Total	100	2,440	2,013	336	2,310	982	87
Aleutian Islands:							
Trawl [2]	25	655	557	49	620	527	47
Hook-and-line/pot gear [3]	75	1,965	1,572	393	.....	.....	.....
Total	100	2,620	2,129	442	2,480	527	47

[1] Except for the sablefish hook-and-line or pot gear allocation, 15 percent of TAC is apportioned to the reserve. The ITAC is the remainder of the TAC after the subtraction of these reserves.

[2] For the portion of the sablefish TAC allocated to vessels using trawl gear, one half of the reserve (7.5 percent of the specified TAC) is reserved for the CDQ program.

[3] For the portion of the sablefish TAC allocated to vessels using hook-and-line or pot gear, 20 percent of the allocated TAC is reserved for use by CDQ participants. The Council recommended that specifications for the hook-and-line gear sablefish IFQ fisheries be limited to 1 year.

Allocation of PSC Limits for Halibut, Salmon, Crab, and Herring

PSC limits for halibut are set forth in regulations at § 679.21(e). For the BSAI trawl fisheries, the limit is 3,675 mt of halibut mortality and for non-trawl fisheries, the limit is 900 mt of halibut mortality. Regulations at § 679.21(e)(1)(vii) specify a 2005 and 2006 chinook salmon PSC limit for the pollock fishery to be 29,000 fish. Regulations at § 679.21(e)(1)(i) allocate 7.5 percent, or 2,175 chinook salmon, as the PSQ for the CDQ program and the remaining 26,825 chinook salmon to the non-CDQ fisheries. Amendment 82 and its implementing rule would establish an AI chinook salmon limit of 700 fish. Regulations at 679.21(e)(1)(i) would allocate 7.5 percent, or 53 chinook salmon, as an AI PSQ for the CDQ program and the remaining 647 chinook salmon to the non-CDQ fisheries. Regulations at § 679.21(e)(1)(viii) specify a 2005 and 2006 non-chinook salmon PSC limit of 42,000 fish. Regulations at § 679.21(e)(1)(i) allocate 7.5 percent or 3,150 non-chinook salmon as the PSQ for the CDQ program and the remaining 38,850 non-chinook salmon to the non-CDQ fisheries. PSC limits for crab and herring are specified annually based on abundance and spawning biomass.

The red king crab mature female abundance is estimated from the 2004 survey data to be 35.4 million king crab and the effective spawning biomass is estimated to be 61.9 million pounds (27,500 mt). Based on the criteria set out at § 679.21(e)(1)(ii), the 2005 and 2006 PSC limit of red king crab in Zone 1 for trawl gear is 197,000 animals as a result of the mature female abundance being above 8.4 million king crab and the effective spawning biomass estimate being greater than 55 million pounds (24,948 mt).

Regulations at § 679.21(e)(3)(ii)(B) establish criteria under which NMFS must specify an annual red king crab bycatch limit for the Red King Crab Savings Subarea (RKCSS). The regulations limit the RKCSS to up to 35 percent of the trawl bycatch allowance specified for the rock sole/flathead sole/''other flatfish'' fishery category and are based on the need to optimize the groundfish harvest relative to red king crab bycatch. The Council recommended, and NMFS approves, a red king crab bycatch limit equal to 35 percent of the trawl bycatch allowance specified for the rock sole/flathead sole/''other flatfish'' fishery category within the RKCSS.

Based on 2004 survey data, the *Chionoecetes bairdi* crab abundance is estimated to be 437.41 million animals. Given the criteria set out at § 679.21(e)(1)(iii), the 2005 and 2006 *C. bairdi* crab PSC limit for trawl gear is 980,000 animals in Zone 1 and 2,970,000 animals in Zone 2 as a result of the *C. bairdi* crab abundance estimate of over 400 million animals.

Under § 679.21(e)(1)(iv), the PSC limit for *C. opilio* crab is based on total abundance as indicated by the NMFS annual bottom trawl survey. The *C. opilio* crab PSC limit is set at 0.1133 percent of the Bering Sea abundance index. Based on the 2004 survey estimate of 4.421 billion animals, the calculated limit is 5,008,993 animals. Under § 679.21(e)(1)(iv)(B), the 2005 and 2006 *C. opilio* crab PSC limit will be 5,008,993 animals minus 150,000 animals which results a limit of 4,858,993 animals.

Under § 679.21(e)(1)(vi), the PSC limit of Pacific herring caught while conducting any trawl operation for groundfish in the BSAI is 1 percent of the annual eastern Bering Sea herring biomass. The best estimate of 2005 and 2006 herring biomass is 201,180 mt. This amount was derived using 2004 survey data and an age-structured biomass projection model developed by the Alaska Department of Fish and Game. Therefore, the 2005 and 2006 herring PSC limit is 2,012 mt.

Under § 679.21(e)(1)(i), 7.5 percent of each PSC limit specified for halibut and crab is allocated as a PSQ reserve for use by the groundfish CDQ program. Regulations at § 679.21(e)(3) require the apportionment of each trawl PSC limit into PSC bycatch allowances for seven specified fishery categories. Regulations at § 679.21(e)(4)(ii) authorize the apportionment of the non-trawl halibut PSC limit into PSC bycatch allowances among five fishery categories. Table 7 lists the fishery bycatch allowances for the trawl and non-trawl fisheries.

Regulations at § 679.21(e)(4)(ii) authorize exemption of specified non-trawl fisheries from the halibut PSC limit. As in past years, NMFS, after consultation with the Council, is exempting pot gear, jig gear, and the sablefish IFQ hook-and-line gear fishery categories from halibut bycatch restrictions because these fisheries use selective gear types that take few halibut compared to other gear types such as non-pelagic trawl. In 2004, total groundfish catch for the pot gear fishery in the BSAI was approximately 18,719 mt with an associated halibut bycatch mortality of about 4 mt. The 2004 groundfish jig gear fishery harvested about 216 mt of groundfish. Most vessels in the jig gear fleet are less than 60 ft (18.3 m) LOA and thus are exempt from observer coverage requirements. As a result, observer data are not available on halibut bycatch in the jig gear fishery. However, a negligible amount of halibut bycatch mortality is assumed because of the selective nature of this gear type and the likelihood that halibut caught with jig gear have a high survival rate when released.

As in past years, the Council recommended the sablefish IFQ fishery be exempt from halibut bycatch restrictions because of the sablefish and halibut IFQ program (subpart D of 50 CFR part 679). The sablefish IFQ program requires legal-sized halibut to be retained by vessels using hook-and-line gear if a halibut IFQ permit holder or his or her hired master is aboard and is holding unused halibut IFQ. NMFS is approving the Council's recommendation. This provision results in reduced halibut discard in the sablefish fishery. In 1995, about 36 mt of halibut discard mortality was estimated for the sablefish IFQ fishery. The estimates for 1996 through 2004 have not been calculated; however, NMFS has no information indicating that it would be significantly different.

Regulations at § 679.21(e)(5) authorize NMFS, after consultation with the Council, to establish seasonal apportionments of PSC amounts in order to maximize the ability of the fleet to harvest the available groundfish TAC and to minimize bycatch. The factors to be considered are: (1) Seasonal distribution of prohibited species, (2) seasonal distribution of target groundfish species, (3) PSC bycatch needs on a seasonal basis relevant to prohibited species biomass, (4) expected variations in bycatch rates throughout the year, (5) expected start of fishing effort, and (6) economic effects of seasonal PSC apportionments on industry sectors. In December 2004, the Council's AP recommended seasonal PSC apportionments in order to maximize harvest among gear types, fisheries, and seasons while minimizing bycatch of PSC based upon the above criteria.

The Council recommended, and NMFS approves, the PSC apportionments specified in Table 7.

TABLE 7.—2005 AND 2006 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL AND NON-TRAWL FISHERIES

Trawl fisheries	Prohibited species and zone					
	Halibut mortality (mt) BSAI	Herring (mt) BSAI	Red King Crab (animals) Zone 1 [1]	*C. opilio* (animals) COBLZ [1]	*C. bairdi* (animals)	
					Zone 1 [1]	Zone 2 [1]
Yellowfin sole	886	183	33,843	3,101,915	340,844	1,788,459
January 20–April 1	262					
April 1–May 21	195					
May 21–July 5	49					
July 5–December 31	380					
Rock sole/other flat/flathead sole [2]	779	27	121,413	1,082,528	365,320	596,154
January 20–April 1	448					
April 1–July 5	164					
July 5–December 31	167					
Turbot/arrowtooth/sablefish [3]		12		44,946		
Rockfish: July 5–December 31	69	10		44,945		10,988
Pacific cod	1,434	27	26,563	139,331	183,112	324,176
Midwater trawl pollock		1,562				
Pollock/Atka mackerel/other [4]	232	192	406	80,903	17,224	27,473
Red King Crab Savings Subarea [6]						
(non-pelagic trawl)			42,495			
Total trawl PSC	3,400	2,012	182,225	4,494,569	906,500	2,747,250
Non-trawl Fisheries						
Pacific cod–Total	775					
January 1–June 10	320					
June 10–August 15	0					
August 15–December 31	455					
Other non-trawl–Total	58					
May 1–December 31	58					
Groundfish pot and jig	exempt					
Sablefish hook-and-line	exempt					
Total non-trawl PSC	833					
PSC reserve [5]	342		14,775	364,424	73,500	222,750
PSC grand total	4,575	2,012	197,000	4,858,993	980,000	2,970,000

[1] Refer to § 679.2 for definitions of areas.
[2] "Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), Greenland turbot, rock sole, yellowfin sole and arrowtooth flounder.
[3] Greenland turbot, arrowtooth flounder, and sablefish fishery category.
[4] Pollock other than pelagic trawl pollock, Atka mackerel, and "other species" fishery category.
[5] With the exception of herring, 7.5 percent of each PSC limit is allocated to the CDQ program as PSQ reserve. The PSQ reserve is not allocated by fishery, gear or season.
[6] In December 2004, the Council recommended that Red King Crab bycatch for trawl fisheries within the RKCSS be limited to 35 percent of the total allocation to the rock sole/flathead sole/"other flatfish" fishery category (see § 679.21(e)(3)(ii)(B)).

Halibut Discard Mortality Rates

To monitor halibut bycatch mortality allowances and apportionments, the Regional Administrator will use observed halibut bycatch rates, assumed discard mortality rates (DMR), and estimates of groundfish catch to project when a fishery's halibut bycatch mortality allowance or seasonal apportionment is reached. The DMRs are based on the best information available, including information contained in the annual SAFE report.

The Council recommended, and NMFS concurs, that the recommended halibut DMR developed by the staff of the International Pacific Halibut Commission (IPHC) for the 2005 and 2006 BSAI groundfish fisheries be used to monitor halibut bycatch allowances established for the 2005 and 2006 groundfish fisheries (see Table 8). These DMRs were developed by the IPHC using the 10-year mean DMRs for the BSAI non-CDQ groundfish fisheries. Plots of annual DMRs against the 10-year mean indicated little change since 1990 for most fisheries. DMRs were more variable for the smaller fisheries which typically take minor amounts of halibut bycatch. The IPHC will analyze observer data annually and recommend changes to the DMR where a fishery DMR shows large variation from the mean. The IPHC has been calculating the CDQ fisheries DMR since 1998 and a 10-year mean is not available. The Council recommended and NMFS concurs with the DMR recommended by the IPHC for 2005 and 2006 CDQ fisheries. The justification for these DMRs is discussed in Appendix A of the final SAFE report dated November 2004.

TABLE 8.—2005 AND 2006 ASSUMED PACIFIC HALIBUT DISCARD MORTALITY RATES FOR THE BSAI FISHERIES

Fishery	Preseason assumed mortality (percent)
Hook-and-line gear fisheries:	
Greenland turbot	15
Other species	11
Pacific cod	11
Rockfish	16
Trawl gear fisheries:	
Atka mackerel	78
Flathead sole	67
Greenland turbot	72
Non-pelagic pollock	76
Pelagic pollock	85
Other flatfish	71
Other species	67
Pacific cod	68
Rockfish	74
Rock sole	77
Sablefish	49
Yellowfin sole	78
Pot gear fisheries:	
Other species	8
Pacific cod	8
CDQ trawl fisheries:	
Atka mackerel	85
Flathead sole	67
Non-pelagic pollock	85
Pelagic pollock	90
Rockfish	74
Yellowfin sole	84
CDQ hook-and-line fisheries:	
Greenland turbot	15
Pacific cod	10
CDQ pot fisheries:	
Pacific cod	8
Sablefish	33

Directed Fishing Closures

In accordance with § 679.20(d)(1)(i), if the Regional Administrator determines that any allocation or apportionment of a target species or ''other species'' category has been or will be reached, the Regional Administrator may establish a directed fishing allowance for that species or species group. If the Regional Administrator establishes a directed fishing allowance, and that allowance is or will be reached before the end of the fishing year, NMFS will prohibit directed fishing for that species or species group in the specified subarea or district (see § 697.20(d)(1)(iii)). Similarly, under regulations at § 679.21(e), if the Regional Administrator determines that a fishery category's bycatch allowance of halibut, red king crab, *C. bairdi* crab or *C. opilio* crab for a specified area has been reached, the Regional Administrator will prohibit directed fishing for each species in that category in the specified area.

The Regional Administrator has determined that the remaining allocation amounts in Table 9 will be necessary as incidental catch to support other anticipated groundfish fisheries for the 2005 and 2006 fishing year:

TABLE 9.—2005 AND 2006 DIRECTED FISHING CLOSURES [1]

[Amounts are in metric tons]

Area	Species	2005 Incidental catch allowance	2006 Incidental catch allowance
Bogoslof District	Pollock	10	10
Aleutian Islands subarea	Non-CDQ Pollock	2,000	2,000
	''Other rockfish''	502	502
Bering Sea subarea	Pacific ocean perch	1,190	1,190
	''Other rockfish''	426	426
Bering Sea and Aleutian Islands	Northern rockfish	4,625	4,625
	Shortraker rockfish	552	552
	Rougheye rockfish	207	207
	''Other species''	24,650	24,820
	CDQ Northern rockfish	375	375
	CDQ Shortraker rockfish	45	45

TABLE 9.—2005 AND 2006 DIRECTED FISHING CLOSURES [1]—Continued

[Amounts are in metric tons]

Area	Species	2005 Incidental catch allowance	2006 Incidental catch allowance
	CDQ Rougheye rockfish	17	17
	CDQ "Other species"	2,175	2,190

[1] Maximum retainable amounts may be found in Table 11 to CFR part 679.

Consequently, in accordance with § 679.20(d)(1)(i), the Regional Administrator establishes the directed fishing allowances for the above species or species groups as zero.

Therefore, in accordance with § 679.20(d)(1)(iii), NMFS is prohibiting directed fishing for these species in the specified areas and these closures are effective immediately through 2400 hrs, A.l.t., December 31, 2006.

In addition, the BSAI Zone 1 annual red king crab allowance specified for the trawl rockfish fishery (see § 679.21(e)(3)(iv)(D)) is 0 mt and the BSAI first seasonal halibut bycatch allowance specified for the trawl rockfish fishery is 0 mt. The BSAI annual halibut bycatch allowance specified for the trawl Greenland turbot/arrowtooth flounder/sablefish fishery categories is 0 mt (see § 679.21(e)(3)(iv)(C)). Therefore, in accordance with § 679.21(e)(7)(ii) and (v), NMFS is prohibiting directed fishing for rockfish by vessels using trawl gear in Zone 1 of the BSAI and directed fishing for Greenland turbot/arrowtooth flounder/sablefish by vessels using trawl gear in the BSAI effective immediately through 2400 hrs, A.l.t., December 31, 2006. NMFS is also prohibiting directed fishing for rockfish outside Zone 1 in the BSAI through 1200 hrs, A.l.t., July 5, 2005.

Under authority of the 2005 interim harvest specifications (69 FR 76870, December 23, 2004), NMFS prohibited directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea of the BSAI effective 1200 hrs, A.l.t., January 20, 2005, through 1200 hrs, A.l.t., September 1, 2005 (70 FR 3311, January 24, 2005). NMFS opened the first directed fisheries in the HLA in area 542 and area 543 effective 1200 hrs, A.l.t., January 22, 2005. The first HLA fishery in area 542 remained open through 1200 hrs, A.l.t., February 5, 2005 and in area 543 remained open through 1200 hrs, A.l.t., January 29, 2005. The second directed fisheries in the HLA in area 542 and area 543 opened effective 1200 hrs, A.l.t., February 7, 2005. The second HLA fishery in area 542 remained open through 1200 hrs, A.l.t., February 21, 2005 and in area 543 remained open through 1200 hrs, A.l.t., February 14, 2005. NMFS prohibited directed fishing for Pacific cod by catcher vessels 60 feet (18.3 meters) length overall and longer using pot gear in the BSAI, effective 12 noon, A.l.t., February 13, 2005 (70 FR 7900, February 16, 2005). NMFS prohibited directed fishing for Atka mackerel in the Central Aleutian District of the BSAI, effective 12 noon, A.l.t., February 17, 2005.

These closures remain effective under authority of these 2005 and 2006 final harvest specifications. These closures supersede the closures announced under the authority of the 2005 interim harvest specifications (69 FR 76870, December 23, 2005). While these closures are in effect, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a fishing trip. These closures to directed fishing are in addition to closures and prohibitions found in regulations at 50 CFR 679.

Bering Sea Subarea Inshore Pollock Allocations

Section 679.4(l) sets forth procedures for AFA inshore catcher vessel pollock cooperatives to apply for and receive cooperative fishing permits and inshore pollock allocations. Table 10 lists the 2005 and 2006 Bering Sea subarea pollock allocations to the seven inshore catcher vessel pollock cooperatives based on 2005 cooperative allocations that have been approved and permitted by NMFS for the 2005 fishing year. The Bering Sea subarea allocations may be revised pending adjustments to cooperatives' membership in 2006. Allocations for cooperatives and open access vessels are not made for the AI subarea because the CAA requires the non-CDQ directed pollock fishery in the AI subarea to be fully allocated to the Aleut Corporation.

TABLE 10.—2005 AND 2006 BERING SEA SUBAREA INSHORE COOPERATIVE ALLOCATIONS

[Amounts are in metric tons]

Cooperative name and member vessels	Sum of member vessel's official catch histories [1]	Percentage of inshore sector allocation	2005 Annual cooperative allocation	2006 Annual cooperative allocation
Akutan Catcher Vessel Association ALDEBARAN, ARCTIC EXPLORER, ARCTURUS, BLUE FOX, CAPE KIWANDA, COLUMBIA, DOMINATOR, EXODUS, FLYING CLOUD, GOLDEN DAWN, GOLDEN PISCES, HAZEL LORRAINE, INTREPID EXPLORER, LESLIE LEE, LISA MELINDA, MARK I, MAJESTY, MARCY J, MARGARET LYN, NORDIC EXPLORER, NORTHERN PATRIOT, NORTHWEST EXPLORER, PACIFIC RAM, PACIFIC VIKING, PEGASUS, PEGGY JO, PERSEVERANCE, PREDATOR, RAVEN, ROYAL AMERICAN, SEEKER, SOVEREIGNTY, TRAVELER, VIKING EXPLORER	245,922	28.130	180,886	182,018
Arctic Enterprise Association BRISTOL EXPLORER, OCEAN EXPLORER, PACIFIC EXPLORER	36,807	4.210	27,073	27,242

TABLE 10.—2005 AND 2006 BERING SEA SUBAREA INSHORE COOPERATIVE ALLOCATIONS—Continued

[Amounts are in metric tons]

Cooperative name and member vessels	Sum of member vessel's official catch histories [1]	Percentage of inshore sector allocation	2005 Annual cooperative allocation	2006 Annual cooperative allocation
Northern Victor Fleet Cooperative ANITA J, COLLIER BROTHERS, COMMODORE, EXCALIBUR II, GOLDRUSH, HALF MOON BAY, MISS BERDIE, NORDIC FURY, PACIFIC FURY, POSEIDON, ROYAL ATLANTIC, SUNSET BAY, STORM PETREL	73,656	8.425	54,177	54,516
Peter Pan Fleet Cooperative AJ, AMBER DAWN, AMERICAN BEAUTY, ELIZABETH F, MORNING STAR, OCEAN LEADER, OCEANIC, PACIFIC CHALLENGER, PROVIDIAN, TOPAZ, WALTER N	23,850	2.728	17,542	17,652
Unalaska Cooperative ALASKA ROSE, BERING ROSE, DESTINATION, GREAT PACIFIC, MESSIAH, MORNING STAR, MS AMY, PROGRESS, SEA WOLF, VANGUARD, WESTERN DAWN	106,737	12.209	78,510	79,001
UniSea Fleet Cooperative ALSEA, AMERICAN EAGLE, ARGOSY, AURIGA, AURORA, DEFENDER, GUN-MAR, MAR-GUN, NORDIC STAR, PACIFIC MONARCH, SEADAWN, STARFISH, STARLITE, STARWARD	213,521	24.424	157,054	158,037
Westward Fleet Cooperative ALASKAN COMMAND, ALYESKA, ARCTIC WIND, CAITLIN ANN, CHELSEA K, DONA MARTITA, FIERCE ALLEGIANCE, HICKORY WIND, OCEAN HOPE 3, PACIFIC KNIGHT, PACIFIC PRINCE, VIKING, WESTWARD I	173,744	19.874	127,795	128,595
Open access AFA vessels	0	0.00	0	0
Total inshore allocation	874,238	100	643,037	647,062

[1] According to regulations at § 679.62(e)(1), the individual catch history for each vessel is equal to the vessel's best 2 of 3 years inshore pollock landings from 1995 through 1997 and includes landings to catcher/processors for vessels that made 500 or more mt of landings to catcher/processors from 1995 through 1997.

In accordance with section 679.20(a)(5)(i)(A)(*3*), NMFS must further divide the inshore sector allocation into separate allocations for cooperative and open access fishing. In addition, according to section 679.22(a)(7)(vii), NMFS must establish harvest limits inside the SCA and provide a set-aside so that catcher vessels less than or equal to 99 ft (30.2 m) LOA have the opportunity to operate entirely within the SCA until April 1. Accordingly, Table 11 lists the Bering Sea subarea pollock allocation to the inshore cooperative and open access sectors and establishes a cooperative-sector SCA set-aside for AFA catcher vessels less than or equal to 99 ft (30.2 m) LOA. The SCA set-aside for catcher vessels less than or equal to 99 ft (30.2 m) LOA that are not participating in a cooperative will be established inseason based on actual participation levels and is not included in Table 11.

TABLE 11.—2005 AND 2006 BERING SEA SUBAREA POLLOCK ALLOCATIONS TO THE COOPERATIVE AND OPEN ACCESS SECTORS OF THE INSHORE POLLOCK FISHERY

[Amounts are in metric tons]

Sector	2005 A season TAC	2005 A season SCA harvest limit [1]	2005 B season TAC	2006 A season TAC	2006 A season SCA harvest limit [1]	2006 B season TAC
Inshore cooperative sector:						
Vessels > 99 ft	n/a	154,632	n/a	n/a	155,600	n/a
Vessels ≤ 99 ft	n/a	25,418	n/a	n/a	25,577	n/a
Total	257,215	180,050	385,822	258,825	181,177	388,237
Open access sector	0	0 [2]	0	0	0 [2]	0
Total inshore sector	257,215	180,050	385,822	258,825	181,177	388,237

[1] The Steller sea lion conservation area (SCA) is established at § 679.22(a)(7)(vii).

[2] The SCA limitations for vessels less than or equal to 99 ft LOA that are not participating in a cooperative will be established on an inseason basis in accordance with § 679.22(a)(7)(vii)(C)(*2*) which specifies that ''the Regional Administrator will prohibit directed fishing for pollock by vessels greater than 99 ft (30.2 m) LOA, catching pollock for processing by the inshore component before reaching the inshore SCA harvest limit before April 1 to accommodate fishing by vessels less than or equal to 99 ft (30.2 m) inside the SCA until April 1.''

Listed AFA Catcher/Processor Sideboard Limits

According to section 679.64(a), the Regional Administrator will restrict the ability of listed AFA catcher/processors to engage in directed fishing for groundfish species other than pollock to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery. The basis for these sideboard limits is described in detail in the final rule implementing major provisions of the AFA (67 FR 79692, December 30, 2002). Table 12 lists the 2005 and 2006 catcher/processor sideboard limits.

All groundfish other than pollock that are harvested by listed AFA catcher/processors, whether as targeted catch or incidental catch, will be deducted from

the sideboard limits in Table 12. However, groundfish other than pollock that are delivered to listed catcher/processors by catcher vessels will not be deducted from the 2005 and 2006 sideboard limits for the listed catcher/processors.

TABLE 12.—2005 AND 2006 LISTED BSAI AMERICAN FISHERIES ACT CATCHER/PROCESSOR GROUNDFISH SIDEBOARD LIMITS

[Amounts are in metric tons]

Target species	Area	1995–1997			2005 ITAC available to trawl C/Ps	2005 C/P sideboard limit	2006 ITAC available to trawl C/Ps	2006 C/P sideboard ard limit
		Retained catch	Total catch	Ratio of retained catch to total catch				
Pacific cod trawl	BSAI	12,424	48,177	0.258	44,779	11,553	42,388	10,936
Sablefish trawl	BS	8	497	0.016	1,037	17	982	16
	AI	0	145	0.000	557	0	527	0
Atka mackerel	Central AI							
	A season [1]	n/a	n/a	0.115	16,419	1,888	16,419	1,888
	HLA limit [2]				9,851	1,133	9,851	1,133
	B season [1]	n/a	n/a	0.115	16,419	1,888	16,419	1,888
	HLA limit [2]				9,851	1,133	9,851	1,133
	Western AI							
	A season [1]	n/a	n/a	0.200	9,250	1,850	9,250	1,850
	HLA limit [2]				5,550	1,110	5,550	1,110
	B season [1]	n/a	n/a	0.200	9,250	1,850	9,250	1,850
	HLA limit [2]				5,550	1,110	5,550	1,110
Yellowfin sole	BSAI	100,192	435,788	0.230	77,083	17,729	76,500	17,595
Rock sole	BSAI	6,317	169,362	0.037	35,275	1,305	34,700	1,284
Greenland turbot	BS	121	17,305	0.007	2,295	16	2,125	15
	AI	23	4,987	0.005	680	3	850	4
Arrowtooth flounder	BSAI	76	33,987	0.002	10,200	20	10,200	20
Flathead sole	BSAI	1,925	52,755	0.036	16,575	597	17,000	612
Alaska plaice	BSAI	14	9,438	0.001	6,800	7	8,500	9
Other flatfish	BSAI	3,058	52,298	0.058	2,550	148	2,550	148
Pacific ocean perch	BS	12	4,879	0.002	1,190	2	1,190	2
	Eastern AI	125	6,179	0.020	2,849	57	2,849	57
	Central AI	3	5,698	0.001	2,808	3	2,808	3
	Western AI	54	13,598	0.004	4,703	19	4,703	19
Northern rockfish	BSAI	91	13,040	0.007	4,625	32	4,625	32
Shortraker rockfish	BSAI	50	2,811	0.018	552	10	552	10
Rougheye rockfish	BSAI	50	2,811	0.018	207	4	207	4
Other rockfish	BS	18	621	0.029	426	12	426	12
	AI	22	806	0.027	502	14	502	14
Squid	BSAI	73	3,328	0.022	1,084	24	1,084	24
Other species	BSAI	553	68,672	0.008	24,650	197	24,820	199

[1] The seasonal apportionment of Atka mackerel in the open access fishery is 50 percent in the A season and 50 percent in the B season. Listed AFA catcher/processors are limited to harvesting no more than zero in the Eastern Aleutian District and Bering Sea subarea, 20 percent of the annual ITAC specified for the Western Aleutian District, and 11.5 percent of the annual ITAC specified for the Central Aleutian District.

[2] Harvest Limit Area (HLA) limit refers to the amount of each seasonal allowance that is available for fishing inside the HLA (see § 679.2). In 2005 and 2006, 60 percent of each seasonal allowance is available for fishing inside the HLA in the Western and Central Aleutian Districts.

Section 679.64(a)(5) establishes a formula for PSC sideboard limits for listed AFA catcher/processors. These amounts are equivalent to the percentage of the PSC amounts taken in the groundfish fisheries other than pollock by the AFA catcher/processors listed in subsection 208(e) and section 209 of the AFA from 1995 through 1997 (see Table 13). These amounts were used to calculate the relative amount of PSC that was caught by pollock catcher/processors shown in Table 13. That relative amount of PSC was then used to determine the PSC sideboard limits for listed AFA catcher/processors in the 2005 and 2006 groundfish fisheries other than pollock.

PSC that is caught by listed AFA catcher/processors participating in any groundfish fishery other than pollock listed in Table 13 would accrue against the 2005 and 2006 PSC sideboard limits for the listed AFA catcher/processors. Section 679.21(e)(3)(v) authorizes NMFS to close directed fishing for groundfish other than pollock for listed AFA catcher/processors once a 2005 or 2006 PSC sideboard limit listed in Table 13 is reached.

Crab or halibut PSC that is caught by listed AFA catcher/processors while fishing for pollock will accrue against the bycatch allowances annually specified for either the midwater pollock or the pollock/Atka mackerel/''other species'' fishery categories under regulations at § 679.21(e)(3)(iv).

TABLE 13.—2005 AND 2006 BSAI AMERICAN FISHERIES ACT LISTED CATCHER/PROCESSOR PROHIBITED SPECIES SIDEBOARD LIMITS [1]

PSC species	1995—1997			2005 and 2006 PSC available to trawl vessels	2005 and 2006 C/P sideboard limit
	PSC catch	Total PSC	Ratio of PSC catch to total PSC		
Halibut mortality	955	11,325	0.084	3,400	286
Red king crab	3,098	473,750	0.007	182,225	1,276

TABLE 13.—2005 AND 2006 BSAI AMERICAN FISHERIES ACT LISTED CATCHER/PROCESSOR PROHIBITED SPECIES SIDEBOARD LIMITS [1]—Continued

PSC species	1995—1997			2005 and 2006 PSC available to trawl vessels	2005 and 2006 C/P sideboard limit
	PSC catch	Total PSC	Ratio of PSC catch to total PSC		
C. opilio [2]	2,323,731	15,139,178	0.153	4,494,569	687,669
C. bairdi:					
Zone 1 [2]	385,978	2,750,000	0.140	906,500	126,910
Zone 2 [2]	406,860	8,100,000	0.050	2,747,250	137,363

[1] Halibut amounts are in metric tons of halibut mortality. Crab amounts are in numbers of animals.
[2] Refer to § 679.2 for definitions of areas.

AFA Catcher Vessel Sideboard Limits

Under section 679.64(a), the Regional Administrator restricts the ability of AFA catcher vessels to engage in directed fishing for groundfish species other than pollock to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery. Section 679.64(b) establishes a formula for setting AFA catcher vessel groundfish and PSC sideboard limits for the BSAI. The basis for these sideboard limits is described in detail in the final rule implementing major provisions of the AFA (67 FR 79692, December 30, 2002). Tables 14 and 15 list the 2005 and 2006 AFA catcher vessel sideboard limits.

All harvests of groundfish sideboard species made by non-exempt AFA catcher vessels, whether as targeted catch or incidental catch, will be deducted from the sideboard limits listed in Table 14.

TABLE 14.—2005 AND 2006 BSAI AMERICAN FISHERIES ACT CATCHER VESSEL SIDEBOARD LIMITS

[Amounts are in metric tons]

Species	Fishery by area/season/processor/gear	Ratio of 1995–1997 AFA CV catch to 1995–1997 TAC	2005 ITAC	2005 Catcher vessel sideboard limits	2006 ITAC	2006 Catcher vessel sideboard limits
Pacific cod	BSAI					
	Jig gear	0.0000	3,811	0	3,608	0
	Hook-and-line CV					
	Jan 1–Jun10	0.0006	173	0	165	0
	Jun 10–Dec 31	0.0006	116	0	110	0
	Pot gear CV					
	Jan 1–Jun 10	0.0006	8,701	5	8,234	5
	Sept 1–Dec 31	0.0006	5,801	3	5,489	3
	CV < 60 feet LOA using hook-and-line or pot gear.	0.0006	1,354	1	1,281	1
	Trawl gear CV					
	Jan 20–Apr 1	0.8609	31,345	26,985	29,672	25,545
	Apr 1–Jun 10	0.8609	4,478	3,449	4,239	3,265
	Jun 10–Nov 1	0.8609	8,956	6,899	8,478	6,531
Sablefish	BS trawl gear	0.0906	1,037	94	982	89
	AI trawl gear	0.0645	557	36	537	35
Atka mackerel	Eastern AI/BS					
	Jig gear	0.0031	69	0	69	0
	Other gear					
	Jan 1–Apr 15	0.0032	3,156	10	3,156	10
	Sept 1–Nov 1	0.0032	3,156	10	3,156	10
	Central AI					
	Jan–Apr 15	0.0001	16,419	2	16,419	2
	HLA limit	0.0001	9,851	1	9,851	1
	Sept 1–Nov 1	0.0001	16,419	2	16,419	2
	HLA limit	0.0001	9,851	1	9,851	1
	Western AI					
	Jan–Apr 15	0.0000	9,250	0	9,250	0
	HLA limit		5,550	0	5,550	0
	Sept 1–Nov 1	0.0000	9,250	0	9,250	0
	HLA limit		5,550	0	5,550	0
Yellowfin sole	BSAI	0.0647	77,083	4,987	76,500	4,950
Rock sole	BSAI	0.0341	35,275	1,203	35,700	1,217
Greenland Turbot	BS	0.0645	2,295	148	2,125	137
	AI	0.0205	680	14	850	17
Arrowtooth flounder	BSAI	0.0690	10,200	704	10,200	704
Alaska plaice	BSAI	0.0441	6,800	300	8,500	375
Other flatfish	BSAI	0.0441	2,975	131	2,550	112

TABLE 14.—2005 AND 2006 BSAI AMERICAN FISHERIES ACT CATCHER VESSEL SIDEBOARD LIMITS—Continued

[Amounts are in metric tons]

Species	Fishery by area/season/processor/gear	Ratio of 1995–1997 AFA CV catch to 1995–1997 TAC	2005 ITAC	2005 Catcher vessel sideboard limits	2006 ITAC	2006 Catcher vessel sideboard limits
Pacific ocean perch	BS	0.1000	1,190	119	1,190	119
	Eastern AI	0.0077	2,849	22	2,849	22
	Central AI	0.0025	2,808	7	2,808	7
	Western AI	0.0000	4,703	0	4,703	0
Northern rockfish	BSAI	0.0084	4,625	39	4,625	39
Shortraker rockfish	BSAI	0.0037	552	2	552	2
Rougheye rockfish	BSAI	0.0037	207	1	207	1
Other rockfish	BS	0.0048	426	2	426	2
	AI	0.0095	502	5	502	5
Squid	BSAI	0.3827	1,084	415	1,084	415
Other species	BSAI	0.0541	24,650	1,334	24,820	1,343
Flathead Sole	BS trawl gear	0.0505	16,575	837	17,100	864

The AFA catcher vessel PSC limit for halibut and each crab species in the BSAI, for which a trawl bycatch limit has been established, will be a portion of the PSC limit equal to the ratio of aggregate retained groundfish catch by AFA catcher vessels in each PSC target category from 1995 through 1997, relative to the retained catch of all vessels in that fishery from 1995 through 1997. Table 15 lists the 2005 and 2006 PSC sideboard limits for AFA catcher vessels.

Halibut and crab PSC that are caught by AFA catcher vessels participating in any groundfish fishery for groundfish other than pollock listed in Table 15 will accrue against the 2005 and 2006 PSC sideboard limits for the AFA catcher vessels. Sections 679.21(d)(8) and (e)(3)(v) provide authority to close directed fishing for groundfish other than pollock for AFA catcher vessels once a 2005 or 2006 PSC sideboard limit listed in Table 15 for the BSAI is reached. The PSC that is caught by AFA catcher vessels, while fishing for pollock in the BSAI, will accrue against the bycatch allowances annually specified for either the midwater pollock or the pollock/Atka mackerel/''other species'' fishery categories under regulations at § 679.21(e)(3)(iv).

TABLE 15.—2005 AND 2006 AMERICAN FISHERIES ACT CATCHER VESSEL PROHIBITED SPECIES CATCH SIDEBOARD LIMITS FOR THE BSAI [1]

[Amounts are in metric tons]

PSC species	Target fishery category [2]	Ratio of 1995–1997 AFA CV retained catch to total retained catch	2005 and 2006 PSC limit	2005 and 2006 AFA catcher vessel PSC sideboard limit
Halibut	Pacific cod trawl	0.6183	1,434	887
	Pacific cod hook-and-line or pot	0.0022	775	2
	Yellowfin sole	.....	.....	.....
	January 20–April 1	0.1144	262	30
	April 1–May 21	0.1144	195	22
	May 21–July 5	0.1144	49	6
	July 5–December 31	0.1144	380	43
	Rock sole/flathead sole/other flatfish [5]	.....	.....	.....
	January 20–April 1	0.2841	448	127
	April 1–July 5	0.2841	164	47
	July 5–December 31	0.2841	167	47
	Turbot/Arrowtooth/Sablefish	0.2327	0	0
	Rockfish (July 1–December 31)	0.0245	69	2
	Pollock/Atka mackerel/other species	0.0227	232	5
Red King Crab	Pacific cod	0.6183	26,563	16,424
Zone 1 [3,4]	Yellowfin sole	0.1144	33,843	3,872
	Rock sole/flathead sole/other flatfish [5]	0.2841	121,413	34,493
	Pollock/Atka mackerel/other species	0.0227	406	9
C. opilio	Pacific cod	0.6183	139,331	86,148
COBLZ [3]	Yellowfin sole	0.1144	3,101,915	354,859
	Rock sole/flathead sole/other flatfish [5]	0.2841	1,082,528	307,546
	Pollock/Atka mackerel/other species	0.0227	80,903	1,836
	Rockfish	0.0245	44,945	1,101
	Turbot/Arrowtooth/Sablefish	0.2327	44,946	10,459
C. bairdi	Pacific cod	0.6183	183,112	113,218
Zone 1 [3]	Yellowfin sole	0.1144	340,844	38,993
	Rock sole/flathead sole/other flatfish [5]	0.2841	365,320	103,787

TABLE 15.—2005 AND 2006 AMERICAN FISHERIES ACT CATCHER VESSEL PROHIBITED SPECIES CATCH SIDEBOARD LIMITS FOR THE BSAI [1]—Continued

[Amounts are in metric tons]

PSC species	Target fishery category [2]	Ratio of 1995–1997 AFA CV retained catch to total retained catch	2005 and 2006 PSC limit	2005 and 2006 AFA catcher vessel PSC sideboard limit
	Pollock/Atka mackerel/other species	0.0227	17,224	391
C. bairdi	Pacific cod	0.6183	324,176	200,438
Zone 2 [3]	Yellowfin sole	0.1144	1,788,459	204,600
	Rock sole/flathead sole/other flatfish [5]	0.2841	596,154	169,367
	Pollock/Atka mackerel/other species	0.0227	27,473	624
	Rockfish	0.0245	10,988	269

[1] Halibut amounts are in metric tons of halibut mortality. Crab amounts are in numbers of animals.
[2] Target fishery categories are defined in regulation at § 679.21(e)(3)(iv).
[3] Refer to § 679.2 for definitions of areas.
[4] In December 2004, the Council recommended that red king crab bycatch for trawl fisheries within the RKCSS be limited to 35 percent of the total allocation to the rock sole/flathead sole/''other flatfish'' fishery category (see § 679.21(e)(3)(ii)(B)).
[5] ''Other flatfish'' for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), Greenland turbot, rock sole, yellowfin sole, arrowtooth flounder.

Sideboard Directed Fishing Closures

AFA Catcher/Processor and Catcher Vessel Sideboard Closures

The Regional Administrator has determined that many of the AFA catcher/processor and catcher vessel sideboard limits listed in Tables 16 and 17 are necessary as incidental catch to support other anticipated groundfish fisheries for the 2005 fishing year. In accordance with § 679.20(d)(1)(iv), the Regional Administrator establishes the sideboard limits listed in Tables 16 and 17 as directed fishing allowances. The Regional Administrator finds that many of these directed fishing allowances will be reached before the end of the year. Therefore, in accordance with § 679.20(d)(1)(iii), NMFS is prohibiting directed fishing by listed AFA catcher/processors for the species in the specified areas set out in Table 16 and directed fishing by non-exempt AFA catcher vessels for the species in the specified areas set out in Table 17.

TABLE 16.—2005 AMERICAN FISHERIES ACT LISTED CATCHER/PROCESSOR SIDEBOARD DIRECTED FISHING CLOSURES [1]

[Amounts are in metric tons]

Species	Area	Gear types	2005 Sideboard limit	2006 Sideboard limit
Sablefish trawl	BS	Trawl	17	16
	AI	Trawl	0	0
Rock sole	BSAI	all	1,305	1,284
Greenland turbot	BS	all	16	15
	AI	all	3	4
Arrowtooth flounder	BSAI	all	20	20
Pacific ocean perch	BS	all	2	2
	Eastern AI	all	57	57
	Central AI	all	3	3
	Western AI	all	19	19
Northern rockfish	BSAI	all	32	32
Shortraker rockfish	BSAI	all	10	10
Rougheye rockfish	BSAI	all	4	4
Other rockfish	BS	all	12	12
	AI	all	14	14
Squid	BSAI	all	24	24
''Other species''	BSAI	all	197	199

[1] Maximum retainable amounts may be found in Table 11 to CFR part 679.

TABLE 17.—2005 AMERICAN FISHERIES ACT CATCHER VESSEL SIDEBOARD DIRECTED FISHING CLOSURES [1]

[Amounts are in metric tons]

Species	Area	Gear types	2005 Sideboard limit	2006 Sideboard limit
Pacific cod	BSAI	hook-and-line	0	0
	BSAI	pot	9	9
	BSAI	jig	0	0
Sablefish	BS	trawl	94	89

TABLE 17.—2005 AMERICAN FISHERIES ACT CATCHER VESSEL SIDEBOARD DIRECTED FISHING CLOSURES [1]—Continued

[Amounts are in metric tons]

Species	Area	Gear types	2005 Sideboard limit	2006 Sideboard limit
	AI	trawl	36	35
Atka mackerel	Eastern AI/BS	jig	0	0
	Eastern AI/BS	other	20	20
	Central AI	all	4	4
	Western AI	all	0	0
Greenland Turbot	BS	all	148	137
	AI	all	14	17
Arrowtooth flounder	BSAI	all	704	704
Pacific ocean perch	BS	all	119	119
	Eastern AI	all	22	22
	Central AI	all	7	7
	Western AI	all	0	0
Northern rockfish	BSAI	all	39	39
Shortraker rockfish	BSAI	all	2	2
Rougheye rockfish	BSAI	all	1	1
Other rockfish	BS	all	2	5
	AI	all	5	5
Squid	BSAI	all	415	415
"Other species"	BSAI	all	1,334	1,343

[1] Maximum retainable amounts may be found in Table 11 to CFR part 679.

Response to Comments

NMFS received 3 letters of comment in response to the proposed 2005 and 2006 harvest specifications. These letters contained 17 separate comments that are summarized and responded to below.

Comment 1: The Council has yet to take any action on the review of the ''Scientific Review of the Harvest Strategy Currently Used in the BSAI and GOA Groundfish Fishery Management Plans.'' The Council's current approach to setting catch rates results in rates that are too high for rockfish.

Response: The report referred to in the comment is:

Goodman, Daniel, Marc Mangel, Graeme Parkes, Terry Quinn, Victor Restrepo, Tony Smith, Kevin Stokes. 2002. ''Scientific Review of the Harvest Strategy Currently Used in the BSAI and GOA Groundfish Fishery Management Plans.'' Prepared for the North Pacific Fishery Management Council. November 21, 2002.

Evaluation of fishery management strategies has been an ongoing research activity of the NMFS, Alaska Fisheries Science Center (AFSC) for years. Most recently, the Programmatic Supplemental Environmental Impact Statement (PSEIS) for the BSAI and GOA Groundfish FMPs devoted thousands of pages to evaluate both current and alternative fishery management strategies. A working group (WG) has been established to ensure the fisheries are managed based on the best available science, and tasked with continuing and expanding the AFSC's research in the area of management strategy evaluation (MSE). MSE research is ongoing and the WG is expected to make significant advancements in this area over the next few years. The GOA SAFE report (page 387) evaluated the harvest strategy used in the rockfish assessments with particular attention given to the consideration of the harvest rates for rockfish because of their ''low productivity'' (Goodman *et al.* 2002). The evaluation indicated that the harvest strategy is sufficiently conservative. The stock assessments are updated annually and adjustments will be made if new data indicates a downturn in the fishery populations. Also, the rockfish section of the SSC's minutes from the December 2004 Council meeting states, ''The SSC appreciates the attention given by the SAFE authors and the Plan Teams to the recommendations that the SSC made last year regarding the ''F40 report'' by Goodman *et al.*, the contributions to stock productivity of older female rockfish, local depletion, and the effects of disaggregation of the ABCs.'' At the February 2005 Council meeting, a discussion paper on rockfish management will be presented by Council staff. Also, the Council includes ecosystem research information in an ecosystem considerations appendix to the SAFE reports.

Comment 2: The EA fails to provide the public with a full and fair analysis of the consequence of implementing the FMPs; and there is no FMP level environmental impact statement (EIS) that evaluates the effects of authorizing fishing pursuant to the FMPs.

Response: Pursuant to NEPA, NMFS prepared an EA for this action. The EA comprehensively analyzes the potential impacts of the 2005 and 2006 harvest specifications and provides the evidence to decide whether an agency must prepare an EIS. The analysis in the EA supports a finding of no significant impact on the human environment as a result of the 2005 and 2006 final harvest specifications. Therefore, an EIS is not required.

Comment 3: The commentor is concerned about the serious limitations and disappointed about the insufficient action taken regarding the Improved Retention/Improved Utilization (IR/IU) program.

Response: This action does not address IR/IU. In 1998, Groundfish FMP Amendments 49/49 were implemented, requiring 100 percent retention of all pollock and Pacific cod in all fisheries, regardless of gear type. This provided incentives for fishermen to avoid catching these species if they were not targeted, and also required that they be retained for processing if they were caught. An overall minimum groundfish retention standard was approved by the Council in June 2003, with increasing retention standards being phased in starting in 2005. NMFS is preparing a proposed rule based on the Council recommendations. Concurrently, the Council is developing a program that allows sectors targeting flatfish species in the BSAI to form fishery

cooperatives. This program is intended to provide these sectors with the operational tools necessary to adhere to the increased retention standards.

Comment 4: The Council and NMFS have taken no action to ensure that adverse impacts on essential fish habitat (EFH) will not occur during the EIS process and that the choice of reasonable alternatives will not be limited.

Response: NMFS prepared a draft EIS for EFH dated January 2004, which included a broad range of alternatives for minimizing the effects of fishing on EFH. Further information on the draft EIS may be found at the NMFS Alaska Region Web site at *www.fakr.noaa.gov*. NMFS is revising the EIS to include two additional alternatives based on public comments. The final EFH EIS is scheduled for publication by June 1, 2005. Fishing in accordance with this action in the context of the fishery as a whole could have led to adverse impacts on EFH. Therefore, NMFS prepared an EFH Assessment that incorporates all of the information required in 50 CFR 600.920(e)(3), and initiated EFH consultation pursuant to 50 CFR 600.920(i). The EFH Assessment is contained in the EA prepared for this action. The consultation found that this action continues to minimize to the extent practicable adverse effects on EFH.

Comment 5: Fishing, as allowed under the current specifications, is overfishing and starves all other marine life of food.

Response: None of the groundfish species managed in Alaska are known to be experiencing overfishing or are overfished as defined by the Magnuson-Stevens Act. Ecosystem considerations are part of the harvest specification process to ensure fish harvests impacts on the ecosystem are minimized as much as possible and that all organisms dependent on the marine ecosystem are adequately protected.

Comment 6: All quotas should be cut by 50 percent starting in 2005 and 10 percent each year thereafter. Also, marine sanctuaries should be established.

Response: The commentor provided no reason for the quotas to be reduced. The decisions on the amount of harvest are based on the best available science and socioeconomic considerations. NMFS finds that the ABCs and TACs are consistent with the biological condition of the groundfish stocks as described in the 2004 SAFE report and approved by the Council. Additionally, this action does not address the creation of marine sanctuaries. The concept of establishing marine reserves is explored in the draft environmental impact statement (EIS) for essential fish habitat (EFH), dated January 2004. Further information on the draft EIS may be found at the NMFS Alaska Region Web site at *www.fakr.noaa.gov.*

Comment 7: A commentor incorporated the Pew Foundation reports on overfishing and the United Nations report on overfishing into their comment.

Response: The specific concerns and relationship of these reports to this action are not presented by the commentor. Because no further details are provided by the commentor, NMFS is unable to respond further to this comment.

Comment 8: The number of vessels that are allowed to catch fish are far to great.

Response: On January 1, 2000, the NMFS implemented the License Limitation Program (LLP), which limits the number, size, and specific operation of vessels that may be deployed in the groundfish fisheries in the exclusive economic zone off Alaska. By limiting the number of vessels that are eligible to participate in the affected fisheries, the LLP places an upper limit on the amount of capitalization that may occur in those fisheries. This upper limit will prevent future overcapitalization in those fisheries at levels that could occur if such a constraint was not present. The number of vessels participating in the groundfish fisheries off Alaska has decreased approximately 16 percent from 1,228 vessels in 2000 to 1,037 vessels in 2003.

Comment 9: Steller sea lions and other seal populations are being decimated by the commercial fisheries.

Response: Several species of groundfish, notably pollock, Pacific cod, and Atka mackerel, are important prey species for Steller sea lions and are also targeted by the groundfish fisheries. The pollock, Pacific cod, and Atka mackerel fisheries may compete with Steller sea lions by reducing the availability of prey for foraging sea lions. However, this potential competition between commercial fishers and Steller sea lions for pollock, Pacific cod, and Atka mackerel is addressed by regulations that limit the total amount of catch and impose temporal and spatial controls on harvest. These Steller sea lion protection measures are designed to preserve prey abundance and availability for foraging sea lions. These protection measures ensure the groundfish fisheries are unlikely to cause jeopardy of extinction or adverse modification or destruction of critical habitat for the Western distinct population segment of Steller sea lions.

Comment 10: NMFS does not use the ''best'' information. It uses manipulated information submitted by commercial fisheries. NMFS does zero law enforcement to catch illegal raping of the sea.

Response: NMFS used data from sources other than the fishing industry reported data. NMFS uses data from fisheries observers who are biologists working independently to collect biological information aboard commercial fishing vessels and at shoreside processing plants in Alaska. Observers are deployed by private, federally permitted observer providers. The NMFS, AFSC, Resource Assessment and Conservation Engineering Division conducts fishery surveys to measure the distribution and abundance of commercially important fish stocks in the BSAI and GOA. This data is used to investigate biological processes and interactions with the environment to estimate growth, mortality, and recruitment to improve the precision and accuracy of forecasting stock dynamics. Data derived from groundfish surveys are documented in scientific reports and are incorporated into stock assessment advice to the Council, international fishery management organizations, the fishing industry, and the general public. See comment 12 regarding NMFS fishery enforcement.

Comment 11: The time period for the public to comment on this proposed rule should be extended by 120 days.

Response: The commentor provided no reason for the comment period extension request. Because no justification is known for extending the comment period, the comment period remains 30 days for the proposed rule.

Comment 12: The fisherman are taking 3 times what they report.

Response: NMFS disagrees with the commentor's assertion that groundfish fishers systematically under-report their catch. The recordkeeping and reporting requirements in these fisheries are comprehensive, and NMFS and United States Coast Guard law enforcement officers conduct numerous vessel boardings each year. Reporting violations do occur, but they are relatively rare compared to the participation in the overall fishery and are prosecuted pursuant to the Magnuson-Stevens Act.

Comment 13: A commentor provided an article regarding the United Nations recommendations for banning of high seas bottom trawling.

Response: The commentor did not provide the relationship of this action to the article. This action is limited to the EEZ off Alaska and does not address high seas commercial fishing activities.

However, NMFS does work on issues concerning high seas commercial fishing activities. One example is the limitation of high seas drift net fishing for salmon in the north Pacific. As a result of this international treaty the United States is empowered to prohibit United States vessels from participating in this activity and enforce the terms of the treaty on the high seas. Also, NMFS, AFSC is conducting studies on the impacts of bottom trawls on the sea floor and the description of bottom types.

Comment 14: It is unclear why there is a slight difference between the 2005 and 2006 A/B season apportionments of the Aleut Corporation fishery.

Response: The values for 2005 and 2006 Aleut Corporation fisheries should be 9,800 mt for the A season and 5,300 mt for the B season. There was an error in the proposed specifications and it has been corrected in the final specifications based on the December Council recommendations.

Comment 15: The decrease in the AI pollock ABC from the proposed amount of 39,400 mt to the final amount of 29,400 mt will change the amount of the Aleut Corporation's A season fishery from 13,800 mt under the proposed harvest specifications to 9,800 mt under the final specifications. This should not affect the CDQ or ICA amounts, or the A season apportionments of the CDQ and ICA.

Response: The Aleut Corporations's A season allocation of pollock decreases from 13,800 mt under the proposed specifications to 9,800 mt under the final specifications. The CDQ and ICA amounts are the same as under the proposed and final specifications.

Comment 16: The commentor agrees that is it appropriate to maintain the 40/60 seasonal apportionment of the CDQ allocation.

Response: The CDQ pollock allocation in the AI will continue to be conducted with the same seasonal apportionments as currently specified for the AI and BS subareas and CDQ components under § 679.20(a)(5)(i)(B).

Comment 17: The ICA does not need to be set at 2,000 mt in the initial specifications.

Response: NMFS emphasizes that this is the first year of new management for AI pollock. In 2003, the total catch of AI pollock was 1,653 mt. NMFS is establishing an ICA of 2,000 mt to ensure enough pollock is available to support bycatch needs in other groundfish fisheries and to minimize the potential of disrupting the AI directed pollock fishery.

Small Entity Compliance Guide

The following information is a plain language guide to assist small entities in complying with this final rule as required by the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule's primary management measures are to announce 2005 final harvest specifications and prohibited species bycatch allowances for the groundfish fishery of the BSAI. This action is necessary to establish harvest limits and associated management measures for groundfish during the 2005 and 2006 fishing years and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area. This action affects all fishermen who participate in the BSAI fishery. The specific amounts of OFL, ABC, TAC and PSC amounts are provided in tabular form to assist the reader. NMFS will announce closures of directed fishing in the **Federal Register** and in information bulletins released by the Alaska Region. Affected fishermen should keep themselves informed of such closures.

Classification

This action is authorized under § 679.20 and is exempt from review under Executive Order 12866.

A Final Regulatory Flexibility Analysis (FRFA) was prepared to evaluate the impacts of the 2005 and 2006 harvest level specifications on directly regulated small entities. This FRFA is intended to meet the statutory requirements of the Regulatory Flexibility Act (RFA).

The proposed rule for the BSAI specifications was published in the **Federal Register** on December 8, 2004 (69 FR 70974). A correction was published on December 22, 2004 (69 FR 76682). An Initial Regulatory Flexibility Analysis (IRFA) was prepared for the proposed rule, and described in the classifications section of the preamble to the rule. Copies of the IRFA prepared for this action are available from Alaska, Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Durall. The public comment period ended on January 7, 2005. No comments were received on the IRFA or regarding the economic impacts of this rule.

The 2005 and 2006 harvest specifications establish harvest limits for the groundfish species and species groups in the BSAI. This action is necessary to allow fishing in 2005 and 2006. About 758 small catcher vessels, 24 small catcher-processors, and six small private non-profit CDQ groups may be directly regulated by the BSAI specifications.

This regulation does not impose new recordkeeping or reporting requirements on the regulated small entities. This regulation does not duplicate, overlap, or conflict with any other Federal rules.

The FRFA examined the impacts of the preferred alternative on small entities within fisheries defined by the harvest of species groups whose TACs might be affected by the specifications. The FRFA identified the following adverse impacts of the preferred alternative on small fishing operations harvesting sablefish and Pacific cod in the BSAI and on CDQ groups operating in the BSAI.

The aggregate gross revenues for an estimated 53 small BSAI sablefish entities were estimated to decline by about $1.6 million. A reduction in revenues of this magnitude would have accounted for about 2.7 percent of total 2003 gross revenues from all sources for these small entities.

The aggregated gross revenues for an estimated 120 small BSAI Pacific cod entities were estimated to decline by about $1.7 million. A reduction in revenues of this magnitude would have accounted for about 1.3% of total 2003 gross revenues from all sources for these small entities.

The aggregate gross revenues for six small BSAI CDQ group entities were estimated to decline by about $1.2 million between 2004 and 2006. This is less than 1 percent of the gross revenues for these allocations in 2004.

Although the preferred alternative had adverse impacts on some classes of small entities, compared to the fishery in the preceding year, alternatives that had smaller adverse impacts were precluded by biological management concerns. Four alternatives were evaluated, in addition to the preferred alternative. Alternative 1 set TACs equal to the $_{max}F_{ABC}$ fishing rate. Alternative 1 was associated with high TACs, high revenues, and TACs that exceeded the statutory BSAI OY. Alternative 2, the preferred alternative, set TACs to produce the fishing rates recommended by the Council on the basis of Plan Team and SSC recommendations. Alternative 3 set TACs to produce fishing rates equal to half the $_{max}F_{ABC}$, and Alternative 4 set TACs to produce fishing rates equal to the last five years' average fishing rate. Alternative 5 set TACs equal to zero.

The BSAI Pacific cod fishermen and CDQ groups would have had larger gross revenues under Alternative 1 than under the preferred alternative. The BSAI sablefish fishermen would not have had larger gross revenues under

any alternative. While Pacific cod fishermen and CDQ groups would have had higher gross revenues under Alternative 1, total BSAI TACs would have been greater than the two million mt BSAI OY required by law. An increase in the TAC for Pacific cod would have had to come at the expense of TACs provided to other operations. Moreover, and most importantly, both the Pacific cod and sablefish TACs set under the preferred alternative were set equal to the ABCs recommended by the Council's BSAI Plan Team and its SSC. Higher TACs would not be consistent with prudent biological management of the fishery; therefore, Alternative 2 was chosen instead of Alternative 1 because it sets TACs as high as possible while still protecting the biological health of the stock. Alternative 2 was chosen instead of Alternatives 3, 4, or 5 because it provided these groups larger gross revenues than Alternatives 3, 4, or 5.

Under the provisions of 5 U.S.C. 553(b)(B), an agency can waive the requirement for prior notice and opportunity for public comment if for good cause it finds that such notice and comment is impracticable, unnecessary, or contrary to public interest. Certain fisheries, such as those for Pacific cod, Atka mackerel, and Pacific ocean perch, are intensive fast-paced fisheries. Other fisheries, such as those for flatfish and rockfish, are critical as directed fisheries and as incidental catch in other fisheries. U.S. fishing vessels have demonstrated the capacity to catch full TAC allocations in all these fisheries. Any delay in allocating full TAC in these fisheries would cause disruption to the industry and potential economic harm through unnecessary discards. These final harvest specifications which contain this TAC allocation were developed as quickly as possible, given Plan Team review in November 2004, Council consideration and recommendations in December 2004, and NOAA Fisheries review and development in January–February 2005. For the foregoing reasons and pursuant to 50 CFR 679.20(b)(3) and 5 U.S.C. 553(b)(B), NMFS finds good cause to waive the requirement for prior notice and opportunity for public comment for the apportionment of a portion of the non-specified reserve to fisheries that it has determined appropriate (see Table 2) to increase the ITAC to an amount that is equal to TAC minus the CDQ reserve in order to allow for the orderly conduct and efficient operation of these fisheries because such notice and comment is impracticable and contrary to the public interest.

Under the provisions of 5 U.S.C. 553(d)(1), an agency can waive a delay in the effective date of a substantive rule if it relieves a restriction. Unless this delay is waived, fisheries that are currently closed (see **SUPPLEMENTARY INFORMATION**) because the interim TACs were reached would remain closed until the final harvest specifications became effective. Those closed fisheries are restrictions on the industry that can be relieved by making the final harvest specifications effective on publication.

Under the provisions of 5 U.S.C. 553(d)(3), an agency can waive a delay in the effective date for good cause found and published with the rule. For all other fisheries not currently closed because the interim TACs were reached, the likely possibility exists for their closures prior to the expiration of a 30-day delayed effectiveness period because their interim TACs or PSC allowances could be reached. Determining which fisheries may close is impossible because these fisheries are affected by several factors that cannot be predicted in advance, including fishing effort, weather, movement of fishery stocks, and market price. Furthermore, the closure of one fishery has a cascading effect on other fisheries by freeing-up fishing vessels, allowing them to move from closed fisheries to open ones, increasing the fishing capacity in those open fisheries and causing them to close at an accelerated pace. The interim harvest specifications currently in effect are not sufficient to allow directed fisheries to continue predictably, resulting in unnecessary closures and disruption within the fishing industry and the potential for regulatory discards. The final harvest specifications establish increased TACs and PSC allowances to provide continued directed fishing for species that would otherwise be prohibited under the interim harvest specifications. These final harvest specifications were developed as quickly as possible, given Plan Team review in November 2004, Council consideration and recommendations in December 2004, and NOAA fisheries review and development in January–February 2005. Additionally, if the final harvest specifications are not effective by February 27, 2005, which is the start of the Pacific halibut season as specified by the IPHC, the longline sablefish fishery will not begin concurrently with the Pacific halibut season. This would cause sablefish that is caught with Pacific halibut to be discarded, as both longline sablefish and Pacific halibut are managed under the same IFQ program.

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*; 16 U.S.C. 1540(f); Pub. L. 105–277, Title II of Division C; Pub L. 106–31, Sec. 3027; Pub L. 106–554, Sec. 209 and Pub. L. 108–199, Sec. 803.

Dated: February 17, 2005.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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Part II

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR 679 and 6805

Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Parts 679 and 6805

[Docket No. 040831251–5032–02; I.D. 082504A]

RIN 0648–AS47

Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule implementing Amendments 18 and 19 to the Fishery Management Plan for Bering Sea/Aleutian Islands (BSAI) King and Tanner Crabs (FMP). Amendments 18 and 19 amend the FMP to include the Voluntary Three-Pie Cooperative Program (hereinafter referred to as the Crab Rationalization Program or Program). Congress amended the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to require the Secretary of Commerce to approve and implement the Program. The action is necessary to increase resource conservation, improve economic efficiency, and improve safety. This action is intended to promote the goals and objectives of the Magnuson-Stevens Act, the FMP, and other applicable law.

DATES: Effective on April 1, 2005.

ADDRESSES: Copies of Amendments 18 and 19, the Final Regulatory Flexibility Analysis (FRFA), and the Environmental Impact Statement (EIS) for this action may be obtained from the NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Durall, and on the Alaska Region, NMFS, Web site at *http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/default.htm*. The EIS contains as appendices the Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), and Social Impact Assessment (SIA) prepared for this action.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Alaska Region, and by e-mail to *David_Rostker@omb.eop.gov,* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Susan Salveson, 907–586–7228 or *sue.salveson@noaa.gov.*

SUPPLEMENTARY INFORMATION: In January 2004, the U.S. Congress amended section 313(j) of the Magnuson-Stevens Act through the Consolidated Appropriations Act of 2004 (Pub. L. 108–199, section 801). As amended, section 313(j)(1) requires the Secretary to approve and implement by regulation the Program, as it was approved by the North Pacific Fishery Management Council (Council) between June 2002 and April 2003, and all trailing amendments, including those reported to Congress on May 6, 2003. In June 2004, the Council consolidated its actions on the Program into the Council motion, which is contained in its entirety in Amendment 18. Additionally, in June 2004, the Council developed Amendment 19, which represents minor changes necessary to implement the Program. The Notice of Availability for these amendments was published in the **Federal Register** on September 1, 2004 (69 FR 53397). NMFS approved Amendments 18 and 19 on November 19, 2004.

NMFS published a proposed rule to implement Amendments 18 and 19 in the **Federal Register** on October 29, 2004 (69 FR 63200). NMFS solicited public comments on the proposed rule through December 13, 2004. NMFS received 49 letters of public comment. NMFS summarized these letters into 234 separate comments, and responded to them under Response to Comments, below.

The Program allocates BSAI crab resources among harvesters, processors, and coastal communities. The Council developed the Program over a 6-year period to accommodate the specific dynamics and needs of the BSAI crab fisheries. The Program builds on the Council's experiences with the halibut/sablefish Individual Fishing Quota (IFQ) program and the American Fisheries Act (AFA) cooperative program for Bering Sea pollock. The Program is a limited access system that balances the interests of several groups who depend on these fisheries. The Program addresses conservation and management issues associated with the current derby fishery, reduces bycatch and associated discard mortality, and increases the safety of crab fishermen by ending the race for fish. Share allocations to harvesters and processors, together with incentives to participate in crab harvesting cooperatives, will increase efficiencies, provide economic stability, and facilitate compensated reduction of excess capacities in the harvesting and processing sectors. Community interests are protected by Community Development Quota (CDQ) allocations and regional landing and processing requirements, as well as by several community protection measures.

This preamble first provides a Crab Rationalization Program overview that presents a general description of all of the Program components. Subsequent sections address the response to public comments and changes in the rule from proposed to final. Please refer to the proposed rule for additional information on the Program.

Crab Rationalization Program Overview

The Program applies to the following BSAI crab fisheries: Bristol Bay red king crab (*Paralithodes camtschaticus*), Western Aleutian Islands (Adak) golden king crab (*Lithodes aequispinus*)—west of 174° W. long., Eastern Aleutian Islands (Dutch Harbor) golden king crab—east of 174° W. long., Western Aleutian Islands (Adak) red king crab—west of 179° W. long., Pribilof Islands blue king crab (*P. platypus*) and red king crab, St. Matthew Island blue king crab, Bering Sea snow crab (*Chionoecetes opilio*), and Bering Sea Tanner crab (*C. bairdi*). Golden king crab is also known as brown king crab. In this document, the phrases ''crab fishery'' and ''crab fisheries'' refer to these fisheries, unless otherwise specified. A License Limitation Program (LLP) license will no longer be required to participate in these crab fisheries.

Several crab fisheries under the FMP are excluded from the Program, including the Norton Sound red king crab fishery, which is operated under a ''superexclusive'' permit program intended to protect the interests of local, small-vessel participants. Also excluded from this Program are the Aleutian Islands Tanner crab fishery, Aleutian Islands red king crab fishery east of 179° W. long., and the Bering Sea golden king crab, scarlet king crab (*L. couesi*), triangle Tanner crab (*C. angulatus*), and grooved Tanner crab (*C. tanneri*) fisheries. An LLP license will be required to participate in the FMP crab fisheries excluded from the Program.

Harvest Sector

Qualified harvesters are allocated quota share (QS) in each crab fishery. To receive a QS allocation, a harvester must hold a permanent, fully transferable LLP license endorsed for that crab fishery. Using LLP licenses for defining eligibility in the Program maintains current fishery participation. Quota

share represents an exclusive but revokable privilege that provides the QS holder with an annual allocation to harvest a specific percentage of the total allowable catch (TAC) from a fishery. IFQs are the annual allocations of pounds of crab for harvest that represent a QS holder's percentage of the TAC. A harvester's allocation of QS for a fishery is based on the landings made by his or her vessel in that fishery. Specifically, each allocation is the harvester's average annual portion of the total qualified catch during a specific qualifying period. Qualifying periods were selected to balance historical and recent participation. Different periods were selected for different fisheries to accommodate closures and other circumstances in the fisheries in recent years.

Quota share is designated as either catcher vessel (CV) shares or catcher/processor (CP) shares, depending on the nature of the LLP license and whether the vessel processed the qualifying harvests on board. Catcher vessel IFQ will be issued in two classes, Class A IFQ and Class B IFQ. Crabs harvested with Class A IFQ will require delivery to a processor holding unused processing quota. Class A IFQ landings also will be subject to a regional delivery requirement. Under this regional requirement, landings will be delivered either in a North or in a South region (in most fisheries). Crabs harvested with Class B IFQ can be delivered to any processor and will not be regionally designated. Landings in excess of IFQ will be forfeited in all cases. Class B IFQ are intended to provide ex-vessel price negotiating leverage to harvesters. For each region of each fishery, the allocation of Class B IFQ will be 10 percent of the total allocation of IFQ to the CV sector.

Transfer of QS and IFQ, either by sale or lease, will be allowed, subject to limits including caps on the amount of shares a person may hold or use. To be eligible to receive transferred QS or IFQ, a person must meet specific eligibility criteria. Initial recipients of QS, CDQ groups, and eligible crab community entities are exempt from the transfer eligibility criteria.

Separate caps will be imposed to limit the amount of QS and IFQ a person can hold and to limit the use of IFQ on board a vessel. These caps are intended to prevent negative impacts from what can be described as excessive consolidation of shares. Excessive share holdings are prohibited by the Magnuson-Stevens Act. Different caps were chosen for the different fisheries because fleet characteristics and dependence differ across fisheries. Separate caps on QS holdings are established for CDQ groups, which represent rural western Alaska communities. Processor holdings of QS will also be limited by caps on vertical integration. Quota share holders can retain and use initial allocations of QS above the caps.

Crew Sector

To protect their interests in the fisheries, qualifying crew will be allocated 3 percent of the initial QS pool. These shares are intended to provide long term benefits to captains and crew. The Council originally intended this provision to apply only to vessel captains. However, NMFS has determined that documentation necessary to allocate Crew QS, called C shares by the Council, requires that these shares be initially issued to individuals who hold a State of Alaska Interim Use Permit. In most cases, this individual will be the captain; however, the State does not require that the holder of the Interim Use Permit be the vessel captain. The allocation to crew will be based on the same qualifying years and computational method used for QS allocations to LLP license holders. Crew (C) QS will be issued as CVC QS and CPC QS, depending on the activity in the qualifying years. To ensure that Crew QS and IFQ benefit at-sea participants in the fisheries, Crew IFQ can be used only when the IFQ holder is on board the vessel.

To be eligible to receive an allocation, an individual is required to have historic and recent participation. Historic participation is demonstrated by at least one landing in each of three of the qualifying years. Recent participation is demonstrated by at least one landing in two of the three most recent seasons, with some specific exceptions.

CV Crew IFQ (called CVC IFQ) will be required to be delivered to shore-based processors for processing. CVC IFQ is not subject to specific delivery requirements until July 1, 2008. After July 1, 2008, CVC IFQ will be subject to the Class A IFQ/Class B IFQ distinction with commensurate regional delivery requirements unless the Council determines, after review, not to apply those designations. Before July 1, 2007, the Council intends to review CVC IFQ landing patterns to determine whether the distribution of landings among processors and communities of CVC IFQ differs from the distribution of IFQ landings.

CP crew will be allocated CPC QS and IFQ that include a harvesting and on-board processing privilege. Crab harvested with CPC IFQ also can be delivered to shore-based processors.

Crew QS and IFQ can be transferred to eligible individuals. Leasing of Crew IFQ is permitted before July 1, 2008. After July 1, 2008, leasing will be permitted only in the case of a documented hardship (such as a medical hardship or loss of vessel) for the term of the hardship, subject to a maximum of 2 years over a 10-year period. Use caps apply to individual Crew QS holdings.

Processing Sector

A processing privilege, analogous to the harvesting privilege allocated to harvesters, will be allocated to processors. Qualified processors will be allocated processor quota share (PQS) in each crab fishery. PQS represents an exclusive but revocable privilege to receive deliveries of a specific portion of the annual TAC from a fishery. The annual allocation of pounds of crab based on the PQS is IPQ. IPQ will be issued for 90 percent of the IFQ allocated harvesters, equaling the amount of IFQ allocated as Class A IFQ. Processor privileges will not apply to the remaining TAC allocated as Class B IFQ, or for Crew IFQ until July 1, 2008. IPQs will be regionally designated for processing (corresponding to the regional designation of the Class A IFQ).

PQS allocations are based on processing history during a specified qualifying period for each fishery. A processor's initial allocation of PQS in a fishery will equal its share of all qualified pounds of crab processed in the qualifying period. Processor shares are transferable, including the leasing of IPQs and the sale of PQS, subject to caps and to community protection measures. IPQs can be used without transfer at any facility or plant operated by a processor. New processors can enter the fishery by purchasing PQS or IPQ or by purchasing crab harvested with Class B IFQ or crab harvested by CDQ groups or the Adak community entity.

A PQS holder is limited to holding 30 percent of the PQS issued for a fishery, except that initial allocations of shares above this limit can be retained and used. In addition, in the snow crab fishery, no processor is permitted to use or hold in excess of 60 percent of the IPQs issued for the Northern region.

Catcher/Processor Sector

Catcher/processors (CPs) have a unique position in the Program because they participate in both the harvesting and processing sectors. To be eligible for CP QS, a person is required to hold a permanent, fully transferable LLP license designated for CP use. In

addition, a person must have processed crab on board the CP, whose history gave rise to the LLP license, in either 1998 or 1999. Persons meeting these qualification requirements will be allocated CP QS in accordance with the allocation rules for QS for all qualified catch that was processed on board. These shares represent a harvest privilege and an on-board processing privilege. Catcher/Processor QS does not have regional designations.

Regionalization

The regional delivery requirements for QS are intended to preserve the historic geographic distribution of landings in the fisheries. Communities in the Pribilof Islands are the prime beneficiaries of this regionalization provision. Two regional designations will be created in most fisheries. The North region is all areas in the Bering Sea north of 56°20′ N latitude. The South region is all other areas. Catcher vessel QS, Class A IFQ, PQS, and IPQ will be regionally designated. Crab harvested with regionally designated IFQ will be required to be delivered to a processor in the designated region. Likewise, a processor with regionally designated IPQ is required to accept delivery of and process crab in the designated region. Legal landings in a region in the qualifying years will result in QS and PQS designated for that region.

The Program has two exceptions to the North/South regional designations. In the Western Aleutian Islands golden king crab fishery, 50 percent of the Class A IFQ and IPQ will be designated as west shares to be delivered west of 174° W. longitude. The remaining 50 percent of the Class A IFQ and IPQ will have no regional designation and will not be subject to a regional delivery requirement. The west designation will be applied to all Class A IFQ and IPQ regardless of the historic location of landings in the fishery. A second exception is the Bering Sea Tanner crab fishery, which will have no regional designation. This fishery is anticipated to be conducted primarily as a concurrent fishery with the regionalized Bristol Bay red king crab and Bering Sea snow crab fisheries, making the regional designation of Tanner crab landings unnecessary.

Crab Harvesting Cooperatives

Harvesters may form voluntary crab harvesting cooperatives in order to collectively harvest their IFQ holdings. A minimum membership of four unique QS holders is required for crab harvesting cooperative formation. A crab harvesting cooperative is required to apply for a crab harvesting cooperative IFQ permit. The crab harvesting cooperative IFQ permit will display the aggregate amount of IFQ in each crab fishery that will be yielded by the collective QS holdings of the members. IFQ could be transferred between crab harvesting cooperatives, subject to NMFS' approval. For inter-cooperative transfers, the crab harvesting cooperative will need to designate the crab harvesting cooperative member engaged in the transaction for purposes of applying the use cap of that member to the IFQ that is being transferred to the crab harvesting cooperative. Crab harvesting cooperative members will be allowed to leave a crab harvesting cooperative or change crab harvesting cooperatives on an annual basis prior to the August 1 deadline for the annual crab harvesting cooperative IFQ permit application. Vessels that are used exclusively to harvest crab harvesting cooperative IFQ will not be subject to use caps. Crab harvesting cooperatives are free to associate with one or more processors to the extent allowed by antitrust law.

Community Protection Measures

The Program includes several provisions intended to protect communities from adverse impacts that could result from the Program. Communities eligible for the community protection measures are those with 3 percent or more of the qualified landings in any crab fishery included in the Program. Based on these criteria, NMFS has determined that the following crab communities meet this criteria: Adak, Akutan, Unalaska, Kodiak, King Cove, False Pass, St. George, St. Paul, and Port Moller. All of these communities are identified as eligible crab communities (ECCs) for purposes of community protection measures.

''Cooling off'' provision. Until July 1, 2007, PQS and IPQ based on processing history from the ECCs can not be transferred from those communities. The use of IPQ outside the community during this period is limited to 20 percent of the IPQ and for specific hardships. PQS and IPQ from three crab fisheries are exempt from the cooling off provision: Tanner crab, Western Aleutian Islands red king crab, and Western Aleutian Islands golden king crab.

IPQ issuance limits. IPQ issuance limits are established to limit the annual issuance of IPQ in seasons when the Bristol Bay red king crab or snow crab TAC exceeds a threshold amount. Under these circumstances, Class A IFQ issued in excess of these thresholds will not be required to be delivered to a processor with IPQ but will be subject to the regional delivery requirements.

Sea time waiver. Sea time eligibility requirements for the purchase of QS are waived for CDQ groups and community entities in ECCs, allowing those communities to build and maintain local interests in harvesting. CDQ groups and ECCs are eligible to purchase PQS but are not permitted to purchase Crew QS.

Right of first refusal (ROFR). ECCs, except for Adak, will have a ROFR on the transfer of PQS and IPQ originating from processing history in the community if the transfer will result in relocation or use of the shares outside the community. Adak is not eligible for the ROFR provision because Adak will receive a direct allocation of Western Aleutian Islands golden king crab. In addition, the City of Kodiak and the Kodiak Island Borough in the Gulf of Alaska (GOA) have a ROFR on the transfer of PQS and IPQ from communities in the GOA north of 56°20′ N. latitude.

Community Development Quota Program and Community Allocations

Community Development Quota Program. The CDQ Program is be expanded to include the Eastern Aleutian Islands golden king crab fishery and the Western Aleutian Islands red king crab fishery. In addition, the CDQ allocations in all crab fisheries covered by the Program are increased from 7.5 to 10 percent of the TAC. The increase will not apply to the CDQ allocation of Norton Sound red king crab because this fishery is excluded from the Program. The crab CDQ fisheries will be managed as separate commercial fisheries by the State under authority deferred to it under the FMP. The State will establish observer coverage requirements, State permitting requirements, and transfer provisions among the CDQ groups. It also will monitor catch to determine when IFQ have been reached, enforce any penalties associated with IFQ overages, and monitor compliance with the requirement that CDQ groups must deliver at least 25 percent of their allocation to shore-based processors.

Crab harvested under the CDQ allocations (except Norton Sound red king crab) are subject to some of the Federal requirements that apply to all crab fisheries under the Program including permitting, recordkeeping and reporting, a vessel monitoring system, and the cost recovery fees.

CDQ groups can participate in the crab fisheries as holders of both QS and PQS. Some CDQ groups will be initial

recipients of QS because they hold LLP licenses and the appropriate catch history. In addition, CDQ groups are exempt from the transfer eligibility requirement related to sea time so they are eligible to obtain QS by transfer, subject to QS use caps for CDQ groups. CDQ groups also will be able to obtain PQS by transfer because there are no transfer restrictions on who can hold PQS. While harvesting crab with IFQ, CDQ groups are subject to the same regulations as apply to other IFQ holders. The purchase and holding of QS and PQS by the CDQ groups is subject to the administrative regulations for the CDQ Program at 50 CFR part 679. These regulations include information on reporting, prior approval, and use requirements for all CDQ investments, which include QS and PQS.

Adak allocation. An allocation of 10 percent of the TAC of Western Aleutian Islands golden king crab will be made to the community of Adak. The allocation to Adak will be made to a nonprofit entity representing the community, with a board of directors elected by the community. As an alternative and in the interim, the allocation and funds derived from it could be held in trust by the Aleut Enterprise Corporation for a period not to exceed 2 years, if the Adak community non-profit entity is not formed prior to implementation of the Program. Oversight of the use of the allocation for ''fisheries related purposes'' is deferred to the State under the FMP. NMFS will have no direct role in oversight of the use of this allocation. The State will provide an implementation review to the Council to ensure that the benefits derived from the allocation accrue to the community and achieve the goals of the fisheries development plan. The Adak allocation will be managed as a separate commercial fishery by the State in a manner similar to management of the crab CDQ fisheries. As with the CDQ allocations, crab harvested under the Adak allocation will be subject to several requirements that apply to all crab fisheries under the Program including permitting, recordkeeping and reporting, a vessel monitoring system, and the cost recovery fees.

Community purchase. Any non-CDQ community in which 3 percent or more of any crab fishery was processed could form a non-profit entity to receive QS, IFQ, PQ and IPQ transfers on behalf of the community. The non-profit entity will be called an eligible crab community organization (ECCO).

Protections for Participants in Other Fisheries

The Program will greatly increase the flexibility for crab fishermen to choose when and where to fish for their IFQ, and this increased flexibility will provide crab fishermen with increased opportunity to participate in other fisheries. Restrictions on participation in other fisheries, also called sideboards, will restrict a vessel's harvests to its historical landings in all GOA groundfish fisheries (except the fixed-gear sablefish fishery). Restrictions will be applied to vessels but will also restrict landings made using a groundfish LLP license derived from the history of a vessel so restricted, even if that LLP license is used on another vessel. Groundfish sideboards in the GOA will be managed by NMFS through fleet-wide sideboard directed fishing closures in Federal waters and for the parallel fishery in state waters.

Arbitration System

BSAI crab fisheries have a history of contentious price negotiations. Harvesters have often acted collectively to negotiate an ex-vessel price with processors, which at times delayed fishing. The Arbitration System was developed to resolve failed price negotiations arising from the creation of QS/IFQ and PQS/IPQ. The complications include price negotiations that could continue indefinitely and result in costly delays and the ''last person standing'' problem where the last Class A IFQ holder deliveries will have a single IPQ holder to contract with, effectively limiting any ability to use other processor markets for negotiating leverage. To ensure fair price negotiations, the Arbitration System includes a provision for open negotiations among IPQ and IFQ holders as well as various negotiation approaches, including: (a) A share matching approach where IPQ holders make known to unaffiliated IFQ holders that have uncommitted IFQ available the amount of uncommitted IPQ they have available so the IFQ holder can match up its uncommitted IFQ by indicating an intent to deliver its catch to that IPQ holder; (b) a lengthy season approach that allows parties to postpone binding arbitration until sometime during the season; and (c) a binding arbitration procedure to resolve price disputes between an IPQ holder and eligible IFQ holders.

The arbitration process will begin preseason with a market report for each fishery prepared by an independent market analyst selected by the PQS and QS holders and the establishment of a non-binding fleet wide benchmark price formula by an arbitrator who has consulted with fleet representatives and processors. Information provided by the sectors for these reports will be historical in nature and at least 3 months old. This non-binding price will guide the above described negotiations. Information sharing among IPQ and IFQ holders, collective negotiations, and release of arbitration results will be limited to minimize the antitrust risks of participants in the Program. The participants in the Arbitration System will also select Contract Arbitrators who will assist in Binding Arbitration.

The binding arbitration procedure is a last best (or final) offer format. The IPQ holder, each IFQ holder, and each crab harvesting cooperative could submit an offer. For each IFQ holder or cooperative, the arbitrator will select between the IFQ holder's offer and the IPQ holder's offer. After an arbitration decision is rendered, an eligible IFQ holder with uncommited IFQ could opt-in to the completed contract by accepting all terms of the arbitration decision as long as the IPQ holder held sufficient uncommitted IPQ.

Monitoring and Enforcement

NMFS and the State of Alaska will coordinate monitoring and enforcement of the crab fisheries. Harvesting and processing activity will need to be monitored for compliance with the implementing regulations. Methods for catch accounting and catch monitoring plans will generate data to provide accurate and reliable round weight accounting of the total catch and landings to manage QS and PQS accounts, prevent overages of IFQ and IPQ, and determine regionalization requirements and fee liabilities. Monitoring measures will include landed catch weight and species composition, bycatch, and deadloss to estimate total fishery removals.

Economic Data Collection

The Program includes a comprehensive economic data collection program to aid the Council and NMFS in assessing the success of the Program and developing amendments necessary to mitigate any unintended consequences. An Economic Data Report (EDR), containing cost, revenue, ownership, and employment data, will be collected on a periodic basis from the harvesting and processing sectors. The data will be used to study the economic impacts of the Program on harvesters, processors, and communities. Pursuant to section 313(j) of the Magnuson-Stevens Act, the data and identifiers will also be used for

Program enforcement and determination of qualification for QS. Consequently, identifiers and data will be disclosed to NOAA Enforcement, NOAA GC, the Antitrust Division of the Department of Justice, the Federal Trade Commission, and RAM. With limited exceptions, participation in the data collection program is mandatory for all participants in the crab fisheries.

Cost Recovery and Fee Collection

NMFS will establish a cost recovery fee system, required by section 304(d)(2) of the Magnuson-Stevens Act, to recover actual costs directly related to the management and enforcement of the Program. The crab cost recovery fee will be paid in equal shares by the harvesting and processing sectors and will be based on the ex-vessel value of all crab harvested under the Program, including CDQ crab and Adak crab. NMFS also will enter into a cooperative agreement with the State of Alaska to use IFQ cost recovery funds in State management and observer programs for BSAI crab fisheries. The crab cost recovery fee is prohibited from exceeding 3 percent of the annual ex-vessel value. Within this limit, the collection of up to 133 percent of the actual costs of management and enforcement under the Program is authorized, which provides for fuller reimbursement of management costs after allocation of 25 percent of the cost recovery fees to the crew loan program.

Crew Loan Program

To aid captains and crew in purchasing QS, a low interest loan program (similar to the loan program under the halibut and sablefish IFQ program) will be created. This program will be funded by 25 percent of the cost recovery fees as required by the Magnuson-Stevens Act. Loan money will be accessible only to active participants and could be used to purchase either QS or Crew QS. Quota share purchased with loan money will be subject to all use and leasing restrictions applicable to Crew QS for the term of the loan. This final rule does not contain regulations to implement the crew loan program. The loan program will be developed by NMFS Financial Services.

Annual Reports and Program Review

NMFS, in conjunction with the State of Alaska, will produce annual reports on the Program. Before July 1, 2007, the Council will review the PQS, binding arbitration, and C share components of the Program. After July 1, 2008, the Council will conduct a preliminary review of the Program. A full review of the entire Program will be undertaken in 2010. Additional reviews will be conducted every 5 years. These reviews are intended to objectively measure the success of the Program in achieving the goals and objectives specified in the Council's problem statement and the Magnuson-Stevens Act. These reviews will examine the impacts of the Program on vessel owners, captains, crew, processors, and communities, and include an assessment of options to mitigate negative impacts.

Summary of Regulation Changes in Response to Public Comments

This section provides a summary of the major changes made to the final rule in response to public comments. All of the specific changes, and the reasons for making these changes, are contained under Response to Comments.

Harvester, Crew, and Processor Sectors

The following significant changes from the proposed to final rule in response to public comments are necessary to meet the requirements of Amendment 18 and 19. In the final rule NMFS:

(1) Revised the way in which Class A IFQ and Class B IFQ are allocated to individual IFQ holders who hold PQS or IPQ, or who are affiliated with PQS or IPQ holders, so that Class A IFQ is issued in proportion to the amount of IPQ that is held by the IPQ holder or affiliates.

(2) Revised the definition of ''affiliation'' to clarify the term ''otherwise controls''.

(3) Clarified that CVC QS and IFQ are not subject to regional designation and the Class A and Class B IFQ assignment for the first three years of the program—until July 1, 2008.

(4) Revised the QS use caps that apply to non-individual PQS and IPQ holders so that the application of those caps considers the QS holding of that PQS and IPQ holder and the total QS holdings of all persons affiliated with that PQS or IPQ holder.

(5) Revised the PQS and IPQ use caps that apply to PQS and IPQ holders so that the PQS or IPQ holdings of that PQS or IPQ holder and the total PQS or IPQ holdings of all persons affiliated with that PQS or IPQ holder are used in the calculation of the PQS or IPQ holder's caps.

(6) Clarified that an ''individual and collective'' rule applies for computing QS use caps for individual PQS holders, CDQ groups, and all other QS holders. This methodology sums all QS holdings by a person and the percentage of ownership by that person in any QS holding entity. This method is more consistent with Amendment 18.

(7) Added provisions on applying limits on the amount of ''custom processing'' that may be undertaken at any one processing facility, or at any facility, or group of facilities that is owned by an IPQ holder.

(8) Clarified the limited exemption that applies to using legal landings based on the activities of a vessel which received an LLP by transfer in order to remain in a fishery.

Crab Harvesting Cooperatives

In response to Council and public comments, NMFS removed the requirement in § 680.21 that crab harvesting cooperatives be formed under the Fishermen's Collective Marketing Act (FCMA, 15 U.S.C. 512). With this change, QS holders that hold PQS and IPQ, as well as QS holders affiliated with PQS and IPQ holders, can participate in crab harvesting cooperatives. To address antitrust concerns, NMFS: (1) Clarified that issuance of a crab harvesting cooperative IFQ permit is not a determination that the crab harvesting cooperative is formed or is operating in compliance with antitrust laws; and (2) added that members of crab harvesting cooperatives, that are not FCMA cooperatives, should consult counsel before commencing any activity under the crab harvesting cooperative if members are uncertain about the legality under the antitrust laws of the crab harvesting cooperative's proposed conduct. Additionally, NMFS added definitions of crab harvesting cooperatives and FCMA cooperatives at § 680.2.

Additionally, NMFS changed the regulations at § 680.42(c)(5) so that a CVC or CPC QS holder is subject to the owner on board restriction regardless of whether he or she joins a crab harvesting cooperative. NMFS revised the final rule at § 680.21(a)(1)(iii)(B) to allow CVC QS holders who join a crab harvesting cooperative to withhold their Class B IFQ from submission to the crab harvesting cooperative. This will take effect after the third year of the Program when CVC QS becomes subject to the Class A/Class B IFQ split. NMFS revised the final rule at § 680.21(a)(1)(iii)(A)–(B) to permit QS holders to hold memberships in one crab harvesting cooperative per fishery. If a QS holder joins a crab harvesting cooperative for fishery, all of that QS holder's IFQ for that fishery will be submitted to the crab harvesting cooperative.

NMFS revised intercooperative transfers at § 680.21(e) to require the designation of the members of the crab

harvesting cooperatives that are engaged in the transfer for purposes of applying the use caps of the members to the cooperative IFQ that is being transferred between the crab harvesting cooperatives.

ROFR

The final rule revises proposed provisions for an ECC's ROFR of purchase of PQS or IPQ that is being proposed by a PQS/IPQ holder for use outside the community. These revisions are in response to public comment and are intended to more closely reflect the original intent of the Council. First, the final rule clarifies that an ECC has discretion on whether or not to designate an ECC entity to represent it in ROFR and enter into civil contract arrangements for this purpose. If an ECC entity is not designated within a reasonable period of time, then the ECC permanently waives its opportunity to exercise ROFR. Second, statute terms for civil contracts establishing ROFR between eligible ECCs and holders of PQS/IPQ have been removed from the regulations. Instead, the regulations now refer to the provisions in section 313(j) of the Magnuson-Stevens Act. This approach ensures consistency with the Magnuson-Stevens Act and is appropriate because NMFS does not enforce these contract terms.

Arbitration System

NMFS made the following significant changes from the proposed to final rule in response to public comments. These changes are necessary to meet the requirements of Amendment 18 and 19. In the final rule NMFS:

(1) Clarified that only IFQ holders can initiate the Binding Arbitration procedure.

(2) Revised the timeline for the 2005 season for QS holders and PQS holders to join an Arbitration Organization which is responsible for selecting a group of experts that can assist in price negotiations: the market analyst, formula arbitrator, and contract arbitrator.

(3) Revised the mechanism for exchanging information between uncommitted IPQ holders and uncommitted Arbitration IFQ holders to allow for a third-party to provide data in an arms-length relationship.

(4) Established a minimum of 25 percent of the total IFQ held by an FCMA cooperative that must be committed to an IPQ holder in order to engage in share matching.

(5) Clarified the timing under which a Binding Arbitration procedure must occur and the process whereby it can occur.

(6) Clarified the ability of persons to participate in FCMA cooperatives and collectively negotiate, and the limits to which FCMA cooperatives may exchange information among cooperatives.

(7) Removed the requirement that the transferors require persons receiving QS/IFQ or PQS/IPQ by transfer to join an Arbitration Organization, and requiring the transferees to do that themselves.

(8) Required that CVO IFQ, CVC IFQ after July 1, 2008, and IPQ would not be issued for a crab QS fishery until the Market Analyst, Formula Arbitrator, or Contract Arbitrators have been selected for that fishery.

(9) Clarified the type of Arbitration Organization which a person must join depending on their holdings of QS/IFQ and PQS/IPQ.

Monitoring and Enforcement

NMFS made two major changes to requirements for CPs as a result of public comment. Both changes reduce the burden on participants in the crab fishery. First, NMFS reduced the required reporting interval for crab catch by CPs from once every twenty four hours to weekly. Second, NMFS removed requirements for CPs to provide an observer work area on board their vessels. NMFS also clarified regulations governing the use of the Interagency Electronic Reporting System (IERS) to ensure that vessels that are unable to use the Internet may report catch using an alternative, NMFS approved, method such as an email attachment to report catch.

Economic Data Collection

In response to public comment requesting additional time to prepare and submit the historic EDRs, the submission interval for the EDR is increased from 60 days to 90 days at §§ 680.6(a)(2), 680.6(c)(2), 680.6(e)(2) and 680.6(g)(2), to provide both the time to gather records and complete an accurate EDR. Also in response to public comment, the time interval allowed for verification of data by all submitters is extended in the final rule at § 680.6(i)(2) to 20 days from the 15 days interval identified in the proposed rule.

Cost Recovery and Fee Collection

The cost recovery fee system remains relatively unchanged from the proposed rule. NMFS received only one comment for the cost recovery fee system. NMFS responded affirmatively to this comment by adjusting the methodology by which CPs must calculate and submit fees to reduce any disparity between fees paid by CPs and shoreside processors. An explanation of the revised methodology for CP fee calculation is contained in the response to comments.

Response to Comments

Harvest Sector

Comment 1: QS should belong to the American public, not fishing industry. It is not fair to the American public to have the interests of only those who enrich themselves have a say over the resource.

Response: Allocating QS and PQS to fishery participants is a provision of Amendment 18. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions as specified in Amendment 18.

Comment 2: If a vessel sinks, it should lose all rights to fish forever.

Response: The sunken vessel provision that allocates QS to LLP license holders who have had a vessel sink are part of Amendment 18. Under section 313(j) of the Magnuson-Stevens Act, NMFS does not possess the discretion to alter the sunken vessel provision as it exists in Amendment 18. Any change to this provision requires an amendment to the Program and should be addressed with the Council.

Comment 3: The term ''IFQ TAC'' used in § 680.40(h)(5)(ii) in the calculation of the Class A IFQ allocation and the IPQ allocation is not defined. Care should be taken in defining the term to show that prior to July 1, 2008, CVC QS yield IFQ that are not subject to the Class A IFQ landing requirements and that IPQ should be issued for 90 percent of the CVO IFQ allocation. After July 1, 2008, CVC QS holders will receive Class A IFQ and IPQ will be issued for 90 percent of the CVO and CVC IFQ allocation. Clarify definition and calculation of IPQ and Class A IFQ allocations.

Response: NMFS agrees and has modified the final rule at § 680.40(h)(5)(ii) to more clearly reflect the nature of the Class A IFQ, the allocations that may occur, and the definition of CVC and CVO QS and IFQ.

Comment 4: Section 680.41(c)(2)(ii)(D)(2)(i) and (ii) does not adequately parallel the Council motion. For corporations and other entities, one ''owner'' (not ''member'') must meet the sea time requirement. In addition, that same owner must hold at least a 20 percent ownership interest in the entity. The section does not exactly parallel these requirements. Use language from the Council motion.

Response: NMFS agrees and has modified the final rule at

§ 680.41(c)(2)(ii)(D)(2)(i) and (ii) to more clearly show that one individual must meet both requirements in order to receive QS or IFQ by transfer. However, the final rule maintains the term ''member'' because not all persons who may hold QS or PQS will have ''owners.'' As an example, non-profit corporations don't have ''owners.''

Comment 5: The provisions § 680.41(l)(2) and (4) concerning the transfer of CVO QS and CVC QS, respectively, should be deleted in their entirety. They specifically provide, ''Notwithstanding QS use limitations under § 680.42, CVO (CVC) QS may be transferred to any person eligible to receive CVO or CPO (CVC or CPC) QS as defined under paragraph (c) of this section.'' These provisions appear to override any use caps contained at § 680.42 (the only section of the regulation defining use caps).

Response: NMFS agrees and has revised § 680.41(i)(5) in the final rule to clarify that the approval criteria for transfer do not preclude the use caps at § 680.42.

Comment 6: The rule limiting the acquisition of LLP licenses (and history) in excess of the cap after June 10, 2002, should apply to § 680.42(b)(3) and (4) (CDQ caps and vertical integration caps), as well as the general caps. Add in control date to this section.

Response: NMFS agrees and has revised § 680.42(a)(1) to accommodate this comment. This revised regulatory text also notes that a ''person will not be issued QS in excess of the use cap established in this section based on QS derived from landings attributed to an LLP license obtained via transfer after June 10, 2002,'' except under limited conditions addressed under the response to comment 40. This provision would apply to both CDQ groups and the vertical integration caps.

Comment 7: For CDQ groups, the individual and collective rule should be used to determine holdings for applying the caps at § 680.42(b)(3).

Response: NMFS agrees and has modified the final rule at § 680.42(b)(3) to clarify that the QS and IFQ use caps apply individually and collectively to CDQ groups to meet the intent of Amendment 18.

Comment 8: Table 7 mixes the concepts of eligibility and qualification. Eligibility defines the persons eligible to receive an allocation. For CVO and CPO, holders of permanent LLP licenses are eligible for an initial allocation. For CVC and CPC, persons meeting the historical participation requirement (*i.e.*, landings in 3 of the qualifying years for vessels) and recency requirements (*i.e.*, landings in 2 of the 3 most recent years) are considered eligible. Once persons are found eligible, their allocations are based on the qualifying years shown in Column B. The same subset of years would apply to all participants (CVO, CPO, CVC, and CPC). Column E is incorrect. In addition, Columns C and D define CVC and CPC eligibility, not qualification. Revise table to reflect difference between eligibility and qualification.

Response: NMFS agrees and has revised Table 7 in the final rule to the reflect the difference between eligibility and qualification.

Comment 9: Table 7 leaves out the season beginning in 1991 for Bering Sea Tanner crab. The seasons shown in (2) and (3) are one season, not two. Revise dates in the table to include the 1991 BS Tanner season.

Response: NMFS agrees and has revised the dates in Table 7 to include the 1991 BS Tanner crab season in the final rule.

Comment 10: Table 7 defines seasons with an opening and closing date. Often the last landing of the season is made after the closing date. The regulation should be clear that legal landings made after the closing date will be counted for allocations. Clarify that these landings will count for determining allocations.

Response: NMFS will consider legal landings made after the closing date of the fishery in the calculation of PQS and QS to be issued provided that the harvests were made during the periods established in Table 7.

Comment 11: Allocating QS only for fisheries for which the holder's LLP license is endorsed is unfair, inequitable, and dramatically limits the amount of QS an LLP license holder will receive. Specifically, if a vessel has substantial history in a crab fishery, but did not qualify for an LLP license endorsement for that fishery, then the LLP license holder should receive QS based on that history.

Response: Allocating QS only for catch history in fisheries for which the holder's LLP license is endorsed is a provision of the Council's motion, which is Amendment 18. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions as specified in Amendment 18. The Council developed the method for distributing QS based on a linkage to permanent fully transferrable LLP license (with limited exemptions) after considerable debate and analysis in the EIS/RIR/IRFA prepared to support Amendment 18 and this final rule.

Comment 12: NMFS should explain how QS distribution will accommodate resolution of appeals on LLP licenses and on QS allocation after initial QS allocation.

Response: NMFS anticipates that all LLP license appeals that affect the interim status of crab LLP licenses will be resolved by the time that this action is effective and the application period commences. However, other potential sources of Program application claims, for example, regarding landings and processing histories, will likely not be complete until during or after the application period. Some features of the Program such as one-time permanent regional QS and PQS assignments require that NMFS base its primary initial issuance computations and distribution on as complete a QS/PQS pool as possible. Therefore it is essential that all persons who believe they may be eligible for QS/PQS apply during the open application period, whether or not their LLP license status or other situation makes them ineligible for QS/PQS at that time. NMFS would not issue QS unless and until a person's crab LLP license gained appropriate status or other claim was resolved in their favor by Final Agency Action of RAM, the Office of Administrative Appeals, or the Regional Administrator. At that time, NMFS would issue QS or PQS as appropriate to their application.

However, no distribution of annual IFQ or IPQ would be made for the newly issued QS/PQS until the next time at which NMFS makes a distribution of annual TAC to QS/PQS holders for that crab fishery so as not to disrupt the balance of existing QS and PQS amounts, arbitration agreements, use cap credits, etc. Regional assignments of QS/PQS issued initially but on a delayed basis would be based on original regional ratios computed from data developed for the primary initial QS issuance event.

Comment 13: Council intent, as stated in Amendment 18, was to calculate each holder's QS as a weighted average. The proposed rule, at § 680.40(c)(2), uses a simple average determined by calculating the holder's percentage in each of the history years, adding up the percentages, and dividing by the number of years. This section should be changed to comply with Council intent. The Council followed AFA, where the boats rejected the simple average approach in favor of adding up all the QS holder's pounds in the aggregate, and then dividing by the aggregate total pounds in all of the history years (weighted average). Guideline harvest level (GHL) volatility in snow crab, for example, illustrates why. The aggregate annual landings vary significantly over the history years, meaning that a QS holder with very high landings in a low

GHL year would get more QS than a consistent participant. Someone who sat out a low GHL year (good idea for the health of the industry and fishery) would be severely penalized.

Response: The methodology used at § 680.40(c)(2) does use a weighted average when calculating the amount of QS that will be issued. The method requires determining the percentage of the total qualified landings a person and summing up the percentage of the total qualified landings of all persons that are qualified to receive QS. A person's percentage of the total qualified landings is divided by the percentage of the percentage of all the qualified landings in that fishery. This methodology is explained in detail in the preamble to the proposed rule (see 69 FR 63208) and in the final rule at § 680.40(c)(2)(iv).

Comment 14: The QS pool is so large that overfishing results. Quotas should be cut by 50 percent this year and 10 percent each year thereafter.

Response: NMFS disagrees. The QS pool represents the portion of available TAC for a fishery that will be allocated to QS holders annually. The QS pool yields IFQ every year which is the pounds of crab the QS holder may harvest, based on the amount of crab available for harvest. Each year, the TAC is determined through a scientific process that is designed to maintain healthy stocks and reduce the risk of overfishing.

Comment 15: The surviving spouse provision in the proposed rule at § 680.41(n) provides that if a QS holder dies, his spouse has 3 years to lease out his QS. There are no additional regulations in the proposed rule to explain what happens after that time. If this provision is similar to the halibut/sablefish QS surviving spouse provision, then the surviving spouse will have to either sell the QS or qualify to have the QS transferred to their name. They qualify by having 150 days of sea time-fishing only, no tendering or research vessel time. If they do qualify, then they have to be on board during the harvesting and delivery of the product.

This would be a hardship for a surviving spouse of a crab QS holder. Crab fishing is much different than halibut fishing, and provides a large portion of a family's annual income. A surviving spouse probably would not be able to leave the children and job and go out to the Bering Sea to crab fish for weeks at a time, a few times a year, even if she could qualify. I don't think it is the wish or intention of QS holders to leave their spouses and families in such a bind. In these cases, the spouse, along with the QS holder, have made significant personal and financial investment in this fishery.

Response: Amendment 18 does not make a specific exemption to allow a beneficiary to receive an additional opportunity to lease IFQ or IPQ, other than the provisions established under the rule. In fact, the three year lease period allowed for beneficiaries of QS and PQS to use the IFQ or IPQ is designed to mirror existing leasing by beneficiaries under the halibut and sablefish IFQ program. Extending this limited leasing ability beyond three years would frustrate the overall intent of the Program, which is to limit leasing after several years have transpired.

A beneficiary of QS or PQS may sell the QS or PQS, or fish the IFQ or IPQ themselves after the three year period. Additionally, for CVO and CPO QS, if the beneficiary owns at least 10 percent of a vessel, they can hire someone else to fish the IFQs after the three year period. This provision is unlike the halibut/sablefish IFQ program where second generation QS holders cannot hire skippers to fish for them.

Comment 16: It is important that any active fisherman who holds Class B IFQ have the ability to transfer those shares to any other active fisherman. For example, an active fisherman who holds Class B IFQ for red king crab and golden king crab should be able to transfer his shares for either or both species to another active fisherman. This accommodates the fact that an active fisherman may have earned IFQ for a species that he is not fishing in a particular season, but should be able to transfer to another active fisherman who is fishing that species in that same season.

Response: Under the rule, Class B IFQ may be transferred to any eligible recipient mid-season, including an active participant in the fisheries.

Comment 17: The final rule should clearly instruct RAM to initially allocate our BSAI crab IFQs directly and individually to the owners of IFQ qualified vessels (corporations, LLCs, and partnerships) in proportion to their stock ownership or interest in the vessels that earned each respective BSAI crab fishing history. This will help NMFS avoid numerous, time-consuming transfers and sale procedures, and substantially reduce federal paperwork.

Response: QS will be issued to the holder of the LLP license at the time of application, and not to the owners of a corporation, or other organization, that holds the LLP license. The exact allocation of QS among the owners of a corporation would be an additional administrative burden on NMFS and the exact allocation may be subject to contractual agreements among the owners that NMFS would be required to interpret and would be subject to appeal. In some cases, owners may wish to have the LLP license holding corporation also hold the QS. NMFS will allocate QS to the entity that holds the LLP license. If the owners of a corporation wish to receive a portion of the QS, that can be accomplished by a subsequent transfer from the QS holding corporation to the corporation's owners. The rule has not been modified.

Comment 18: The final rule should include a provision that provides for post delivery transfers of IFQ. Too often small errors in estimating the average weight of crab has adversely affect the crew's ability to judge the poundage of crab on board. Allowing transfers of IFQ after delivery would provide vessel operators with the flexibility needed to make the right decisions, and be consistent with national standard 1 of the Magnuson-Stevens Act.

Response: Transfers of IFQ after deliveries are particularly problematic for NMFS to track and monitor. In particular, NMFS does not have the ability to keep ''real time'' accounts accurate enough to allow this type of transfer. Amendment 18 does not provide any provisions for IFQ overages or the ability to undertake post-delivery transfers. While there may be some overages in some of the fisheries, NMFS does not anticipate that these overages will be severe in most cases and after the Program has been in place for a period of time, the likelihood of these overages will decrease.

Comment 19: The final rule should include language that allows flow thru of grandfathered ownership to an individual past the current one percent cap. For example, in the proposed rule an individual is allowed their historic ownership of QS past the one percent cap if earned in the qualification years and vessel history is acquired prior to January 1, 2002. Because QS will be awarded to LLP license ownership groups initially, the regulations should make sure the QS can flow thru to individual owners based on their ownership make up with no penalty assessed if their grandfathered QS exceeds one percent.

Response: Amendment 18 is clear that the exemption to the QS and IFQ use caps for corporations or other entities that are initially issued QS or IFQ in excess of the use caps do not extend to the individual members that comprise that corporation or other entity. The use cap exemption is limited to the entity that initially received the QS or IFQ, not to its constituent members who can only receive QS or IFQ from the entity

through transfers. Therefore, each member of that entity is subject to the QS and IFQ use caps without exemption. The exemption to the QS and IFQ use caps does not extend to persons who receive QS or IFQ by transfer.

Comment 20: The proposed rule at § 680.41(l)(2) and (4) incorrectly waives all use caps with respect to harvest shares. The motion establishes use caps.

Response: NMFS agrees and has modified the wording in the final rule at § 680.42(i)(5). See also response to comment 5.

Comment 21: The proposed rule at § 680.42(b)(4) exempts all PQS holders from the individual IFQ caps and applies a higher use cap to those persons. The motion intended a very limited exemption that would not apply to individuals.

Response: NMFS agrees and has modified the provision in the final rule at § 680.42(b)(4) to better reflect the intent of Amendment 18 by establishing that individual PQS holders do not receive an exemption to the overall QS and IFQ use cap that applies to non-individual PQS holders who also hold QS or IFQ.

Comment 22: If all vessels with catch history in the Eastern Aleutian Islands golden king crab fishery in the qualifying years were granted QS then there would not be such a concentration of QS holders in that fishery. Allocating QS only to holders of an LLP license endorsed for that fishery would result in a violation of the excessive shares provision of the Magnuson-Stevens Act.

Response: NMFS agrees that allocating QS to all vessels with catch history in the fishery would result in more QS holders in that fishery, however, Amendment 18 is clear that QS will only be issued for catch history for which the holder's LLP license is endorsed, with one limited exemption. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program as specified in Amendment 18.

Comment 23: In the early stages of the Crab Rationalization Program, it was discussed whether or not golden king crab should be included; as it was a fishery that still had never fully been utilized. Instead of excluding golden king crab, the opposite took place, in that the golden king crab fishery qualification period of 1996–2000, all years, is the most stringent of all crab fisheries. The golden king crab qualifications are further compounded because golden king crab is the only crab fishery that is not allowed to drop one year in its calculations. Not allowing the dropping of a year is a blatant discriminatory measure. The golden king crab IFQ qualification years are years in which the golden king crab fishery GHLs were not fully harvested and the fishery lasted 12 months. The golden king crab fishery GHL has only become fully utilized for the first time in the year 2000. The proposed window of years for golden king crab was when the smallest number of approximately 15–17 vessels, had ever participated in the history of the golden king crab fishery.

The result is a select group of vessels will receive excessive golden king crab QS. Approximately 6 to 8 vessels would receive approximately 70 percent to 80 percent of the QS. Therefore, the golden king crab window of years has disenfranchised many of the other golden king crab LLP license holders; to benefit a select group of excessive share recipients. Golden king crab is the only fishery that ''must'' use the recent years of history up until implementation, as the GHLs were finally fully harvested.

There was a lot of testimony to the Council requesting the qualification period include the current years in which the GHLs were finally fully harvested. NOAA General Counsel also stated on the record that fishing history up until time of final action should be considered. Additionally the court ruling over the Halibut IFQ lawsuit, stated that fishing history up until final action should be considered. Yet the Council did not consider the years of history beyond 2000.

In conclusion, the qualification period for the golden king crab fishery does not conform to the National Standards under the Magnuson-Stevens Act. National Standards state that no such measure shall have economic allocation as its sole purpose. It is easy to point out that the specific years selected for golden king crab are for the sole purpose of economic allocation to a select few vessels. National standards state that ''allocations should be fair and equitable to all fisherman'', not just a select few vessels as in golden king crab fishery. National Standards state that allocations shall be carried out in such a manner that no particular entity acquires an excessive share, not the excessive shares that are proposed in golden king crab fishery. National Standards must be adhered to.

Response: Amendment 18 establishes the qualifying years for the golden king crab fishery. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program as specified in Amendment 18. Therefore, this provision does not violate the Magnuson-Stevens Act and the rule has not been modified. The Council considered recent participation in the golden king crab fishery in developing this Program. The allocation of QS or PQS in the golden crab fishery is based on an extensive decision making process and the EIS/RIR/IRFA prepared for this action considered a variety of years for the initial allocation of QS.

Comment 24: The proposed rule at § 680.40(c)(2)(vii) requires an interim LLP license as a condition of eligibility for an LLP license/catch history exemption contemplated by the Council; and also disallows severability of catch history from an LLP license for initial allocation of QS. Additionally, § 680.40(b)(4)(ii)(B)(E) disallows severability of landings and history from LLP licenses. By requiring an interim LLP license to qualify for the exemption, the proposed rule excludes a vessel for which there was no interim LLP license, but which otherwise would qualify for the exemption. The proposed Council motion did not require an interim LLP license as a qualification for the history exemption, and it was not the intent of the Council to exclude the vessels in question. The final regulations should allow the history exemption for a very limited number of vessels in question (must have conducted a transfer by January 1, 2002) by removing the requirement of an interim LLP license for eligibility under this provision and providing an exception from the proposed rule which disallows severability of landings and catch history from the LLP license.

Response: NMFS agrees and has modified the final rule at § 680.40(b)(4)(vii) to remove the requirement of an interim LLP license for eligibility under this provision, based on this comment and comments 42 and 43. This provision is intended to address a specific situation in which LLPs were transferred between vessels so that a vessel could legally remain in the fishery. Amendment 18 did not specify that an interim LLP was a requirement to qualify for this provision.

Comment 25: The proposed rule at § 680.40(h)(4) provides that persons with 10 percent common ownership with a PQS holder would receive all Class A IFQ (and no Class B IFQ). The motion intended that the exclusively Class A IFQ allocation be limited to the amount of IFQ ''controlled'' by the IPQ holder, with the remainder allocated as Class A and Class B IFQ. Eligibility to receive an allocation of Class B IFQ in the Council motion relies on whether the processor ''controls'' delivery of the IFQ. Use of a ''control'' standard for determining whether Class B IFQ will be allocated has two effects: First, if the processor holds a limited amount of

IPQ, the Class A IFQ only allocation should be limited to an amount of IFQ that offset the IPQ holding, with the remainder of the allocation subject to the Class A/Class B IFQ split. Using this approach, a person receives a Class A only IFQ allocation for only those IFQ that are controlled by the processor, with the remainder of the allocation (which is beyond the control of the processor) as a Class A/Class B allocation. Second, if the processor does not control deliveries (regardless of the number of IPQ held), the Class B IFQ allocation will be necessary for negotiating strength of the person controlling deliveries in their negotiations with processors generally. If a ''control'' affidavit is used for determining who will receive Class B IFQ, the term ''control'' must be well-defined, so that the signatory to the affidavit knows what the attestation means.

Allocation of ''only Class A IFQ'' should be limited to the amount of controlled IFQ. The remainder of the allocation should be subject to the Class A/Class B division of fully independent harvesters. Additionally, the definition of control should be revised to reflect the nature of control at issue (*i.e.,* does the IPQ holder control the delivery of the IFQ). This definition may rely to some extent on ''affiliation,'' but control of deliveries should be paramount.

Response: Amendment 18 provides that:

(1) Crab harvester QS held by IPQ processors and persons affiliated with IPQ processors will only generate Class A annual IFQ, so long as such QS is held by the IPQ processor or processor affiliate.

(2) IPQ processors and affiliates will receive Class A IFQ at the full poundage appropriate to their harvesters QS percentage.

(3) Independent (non-affiliated) harvesters will receive Class B IFQ pro rata, such that the full Class B QS percentage is allocated to them in the aggregate.

(4) ''Affiliation'' will be determined based on an annual affidavit submitted by each QS holder. A person will be considered to be affiliated, if an IFQ processor controls delivery of a QS holder's IFQ.

The commenter raises two separate points in this comment: (1) What is control for purposes of determining the amount of Class A IFQ that is to be issued to a person holding QS that is an IPQ processor or affiliate; and (2) how much Class A IFQ should be allocated to an IPQ processor or affiliate? Both of these questions must be answered to address the commenter's question.

(1) What Is Control?

The proposed rule measured control by requiring that each year in the Annual Application for Crab IFQ/IPQ the applicant provide documentation of affiliation declaring any and all affiliations using affiliation as defined in § 680.2 (See § 680.4(f)). Affiliation for purposes of determining a linkage with a PQS or IPQ holder is defined as: (1) Common ownership, either directly or indirectly by the PQS or IPQ holder of more than 10 percent of the QS or IFQ holding entity; (2) control of a 10 percent or greater interest by a PQS or IPQ holding entity in a QS or IFQ holding entity by controlling ownership or voting stock; and (3) a PQS or IPQ holder otherwise controlling a QS or IFQ holding entity through any other means whatsoever. This definition of affiliation is intended to broadly include activities that would allow a PQS or IPQ holding entity to exercise control over the activities of a QS or IFQ holder—specifically, the control of where the IFQ crab would be delivered. The definition of ''otherwise controls'' in the affiliation definition is intended to be broad and would encompass a range of arrangements either contractual or otherwise that could be used to express control. The current definition of affiliation does not define specific indices of control such as are provided in the AFA (*See* § 679.2 for the definition of affiliation under the AFA) or under regulations that govern the control of a fishing vessel by a non-U.S. citizen as defined under Maritime Administration (MARAD) regulations (*See* 46 CFR 356.11), although those indices of ''control'' would be subsumed under the broad definition of ''otherwise controls'' in the affiliation definition contained in the proposed rule.

Amendment 18 does not expressly define the method for establishing how control is to be measured, what indices should be used, and whether additional factors such as ownership of the IFQ holding entity could be used to define control. NMFS has decided that because control is not specifically defined in Amendment 18 and because control can be expressed in a variety of ways, that the affidavit that is submitted each year should include a definition of control of delivery that includes the ability of the IPQ holder to direct the delivery of the IFQ using measures of ownership and otherwise controlling the operations of the IFQ holder. These two aspects of ''control'' are necessary to ensure that IFQ that is held by an IPQ holder or an affiliate is apportioned the appropriate amount of Class A IFQ. Ownership is frequently used as one index of control in measuring the ability of a person to exercise control over a corporation. Owning a corporation effectively determines the course of the activities of that corporation. The amount of ownership that results in an ability for the IPQ holder to direct the business operations (*i.e.,* where the IFQ crab are delivered) is subject to some debate and business arrangements.

The EIS prepared for the final rule does not provide a specific example of how a PQS or IPQ holder may control the deliveries of an IFQ holder. Section 2.2 of the EIS notes that: only QS holders that are unaffiliated with holders of processing shares would receive Class B IFQs. Holders of processing shares and their affiliates that hold QS would be allocated Class A IFQs for all of their IPQ holdings, with the remainder of their IFQ allocated as Class A IFQ and Class B IFQ at the same ratio as those allocated to independent harvesters. The annual poundage allocation of IFQ arising from the QS would be unaffected by the Class A/Class B IFQ distinctions. For each region of each fishery, the allocation of Class B IFQ would be 10 percent of the total allocation of IFQ. The absence of an affiliation with a holder of processing shares would be established by a harvester filing an annual affidavit stating that the use of any IFQ held by that harvester is not subject to any control of any holder of processing shares.

While this description provides some detail about the actual allocation of the Class A and Class B IFQ, and that affiliation with a processor would be established by an annual affidavit, the indices for control are not defined.

The proposed rule used a 10 percent ownership control standard as a means of measuring the control over an entity based on several factors: (1) The use of a 10 percent standard in several other aspects of Amendments 18; and (2) the standard used under the AFA which is a rationalization program that uses an affiliation definition for purposes of applying use caps and processing sideboard limitations.

Use of the 10 Percent Standard in Amendment 18. There are several sections throughout Amendment 18 where a 10 percent common ownership standard is used for purposes of determining whether or not a linkage occurs. While these standards do not *per se* state that a 10 percent common ownership standard is applicable to establish control, the consistent use of a 10 percent common ownership standard in various aspects of this program suggests that a 10 percent standard was perceived to be a threshold level at

which some form of control is being exercised by one entity over another entity. The principal use of the 10 percent standard is found in the following sections of Amendment 18:

(1) 1.6.2 Leasing of QS (leasing is equivalent to the sale of IFQs without the accompanying QS.). Leasing is defined as the use of IFQ on vessel which a QS owner holds less than 10 percent ownership of vessel or on a vessel on which the owner of the underlying QS is not present

(2) 1.6.4 Controls on vertical integration (ownership of harvester QS by processors): Option 3: Vertical integration ownership caps on processors shall be implemented using both the individual and collective rule using 10 percent minimum ownership standards for inclusion in calculating the cap. PQS ownership caps are at the company level.

(3) 2.7.1 Ownership caps. PQS ownership caps should be applied using the individual and collective rule using 10 percent minimum ownership standards for inclusion in calculating the cap. PQS ownership caps are at the company level.

(4) *Cooperative Section Rules governing cooperatives.* The Council clarified the following rules for governing cooperatives: Four entities are required for a cooperative. The requirement for four owners to create a cooperative would require four unique entities to form a cooperative. Independent entities must be less than 10 percent common ownership without common control (similar to the AFA common ownership standard used to implement ownership caps).

The RIR/IRFA prepared for this action also used a 10 percent ownership standard for purposes of measuring whether a common linkage exists between a processor and a harvester and whether a vessel was considered to be affiliated with a processor. (*See* 3.7.9.4 Shares of processor affiliates, and page 293 of Appendix 1). As is noted in the RIR/IRFA ''[t]his level of ownership and the ownership of affiliates is intended to capture all relationships and influences and was used for determining ownership under the AFA (*See* page 191 of Appendix 1).'' The RIR/IRFA analyzed the potential economic impacts of affiliation using this standard and the potential impacts on affiliated IFQ holders was detailed for each of the crab QS fisheries.

While alternative ownership standards could be chosen, NMFS is relying on the frequent and consistent use of a 10 percent standard throughout Amendments 18 and 19 and the EIS/RIR/IRFA prepared to support this action as the basis for establishing affiliation, and therefore control, as being triggered when one entity holds a 10 percent or great common ownership interest in another entity.

Other Indices of Control. Amendment 18 indicated that control would be expressed ''if an IPQ processor controls delivery of a QS holder's IFQ.'' Amendment 18 does not provide additional guidance on how that control may be expressed. The preamble to the proposed rule provides examples of control based on the definition of affiliation. ''Examples of the types of control that may be encompassed by this definition include the authority to direct the delivery of crab harvested under an IFQ permit held by the second entity to a specific RCR, or when one entity absorbs the majority of costs and normal business risks associated with the operation of a second entity, including the costs associated with obtaining and using any amount of the QS, PQS, IFQ, or IPQ held by the second entity.'' The definition used in the proposed rule is broad, but may not provide an adequate definition for purposes of the affidavit that is required on an annual basis.

NMFS agrees that the definition of ''otherwise controls'' could be clarified by using specific indices in the final rule. NMFS is expanding the definition of ''otherwise controls'' using the indices that are used for determining impermissible control by a non-citizen of a United States fishing vessel under MARAD regulations at (46 CFR 356.11) as a guide for these specific indices. Those indices are detailed in the final rule and include those situation in which a PQS or IPQ holder has:

(1) The right to direct, or does direct, the business of the entity which holds the QS or IFQ;

(2) The right in the ordinary course of business to limit the actions of or replace, or does limit or replace, the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of the entity which holds the QS or IFQ;

(3) The right to direct, or does direct, the transfer of QS or IFQ;

(4) The right to restrict, or does restrict, the day-to-day business activities and management policies of the entity holding the QS or IFQ through loan covenants;

(5) The right to derive, or does derive, either directly, or through a minority shareholder or partner, and in favor of a PQS or IPQ holder, a significantly disproportionate amount of the economic benefit from the holding of QS or IFQ;

(6) The right to control, or does control, the management of or to be a controlling factor in the entity holding QS or IFQ;

(7) The right to cause, or does cause, the sale of QS or IFQ;

(8) Absorbs all of the costs and normal business risks associated with ownership and operation of the entity holding QS or IFQ;

(9) Has the ability through any other means whatsoever to control the entity that holds QS or IFQ.

Other factors that may be indica of control include, but are not limited to, the following:

(1) If a PQS or IPQ holder or employee takes the leading role in establishing an entity that will hold QS or IFQ;

(2) If a PQS or IPQ holder has the right to preclude the holder of QS or IFQ from engaging in other business activities;

(3) If a PQS or IPQ holder and QS or IFQ holder use the same law firm, accounting firm, etc.;

(4) If a PQS or IPQ holder and QS or IFQ holder share the same office space, phones, administrative support, etc.;

(5) If a PQS or IPQ holder absorbs considerable costs and normal business risks associated with ownership and operation of the QS or IFQ holdings;

(6) If a PQS or IPQ holder provides the start up capital for the QS or IFQ holder on less than an arm's-length basis;

(7) If a PQS or IPQ holder has the general right to inspect the books and records of the QS or IFQ holder;

(8) If the PQS or IPQ holder and QS or IFQ holder use the same insurance agent, law firm, accounting firm, or broker of any PQS or IPQ holder with whom the QS or IFQ holder has entered into a mortgage, long-term or exclusive sales or marketing agreement, unsecured loan agreement, or management agreement.

(2) How Much Class A IFQ Should Be Allocated to an IPQ Processor or Affiliate?

The second main issue raised by the commenter is how much Class A IFQ is issued to QS or IFQ holders who are affiliated with PQS or IPQ holders. Amendment 18 appears to be somewhat internally inconsistent. It states that ''Crab harvester QS held by IPQ processors and persons affiliated with IPQ processors will only generate Class A annual IFQ, so long as such QS is held by the IPQ processor or processor affiliate.'' However, the next sentence apparently modifies this statement by noting that ''IPQ processors and affiliates will receive Class A IFQ at the full poundage appropriate to their

harvesters QS percentage.'' Section 2.2 of the EIS further supports an approach in which the amount of Class A IFQ that is issued to an IFQ holder or affiliate is based on the proportion of QS held to the amount of PQS held by the PQS holder to which the QS holder is affiliated.

NMFS is interpreting Amendment 18 in the following manner:

(1) If a person holds IPQ and IFQ, than that person will be issued Class A IFQ only for the amount of IFQ equal to the amount of IPQ held by that person. Any remaining IFQ would be issued as Class A and Class B IFQ in a ratio so that the total Class A and Class B IFQ issued in that fishery is issued as 90 percent Class A IFQ and 10 percent Class B IFQ.

As an example, if a person held 100,000 pounds of IPQ in a fishery and 120,000 pounds of IFQ, that person would receive 100,000 pounds of Class A IFQ and 20,000 pounds of IFQ issued in the appropriate Class A and Class B ratio for that person;

(2) If a person holds IPQ in excess of the amount of IFQ held by that person, all IFQ holders affiliated with that IPQ holder will receive only Class A IFQ in proportion to the amount of IFQ held by that person relative to that amount of IPQ held by the IPQ holder to which they are affiliated. Any remaining IFQ would be issued as Class A and Class B IFQ in a ratio so that the total Class A and Class B IFQ issued in that fishery is issued as 90 percent Class A IFQ and 10 percent Class B IFQ.

For example, assume that an IPQ holder holds 200,000 pounds of IPQ and 100,000 pounds of IFQ in a fishery. Also assume that the IPQ holder is affiliated, either through a 10 percent common ownership standard, or through control, with 3 IFQ holders (IFQ holder A, IFQ holder B, and IFQ holder C). IFQ holder A has 100,000 pounds of IFQ, IFQ holder B has 25,000 pounds of IFQ, and IFQ holder C has 175,000 pounds of IFQ. Collectively, the three affiliated IFQ holders have 300,000 pounds of IFQ.

The IPQ holder would be issued all 100,000 pounds of his IFQ holdings as Class A IFQ because the amount of IPQ held (200,000 pounds) exceeds the total amount of IFQ that he holds. The remaining 100,000 pounds of Class A only IFQ would be allocated on a pro rata basis as follows.

(1) The total remaining IPQ (100,000 pounds) is divided by the total IFQ held by all affiliates of the IPQ holder (300,000 pounds). This yields a Class A only ratio of .333.

(2) The IFQ held by each affiliate is multiplied by the Class A only ratio. In our example:

IFQ holder A = 100,000 pounds × (0.333) = 33,333 pounds of Class A only IFQ

IFQ holder B = 25,000 pounds × (0.333) = 8,333 pounds of Class A only IFQ

IFQ holder C = 175,000 pounds × (0.333) = 58,333 pounds of Class A only IFQ.

Any remaining IFQ held by these IFQ holders would be allocated using the Class A and Class B ratio. This example is limited to IFQ holders being affiliated with only one IPQ holder. In cases where an IFQ holder is affiliated with multiple IPQ holders with IPQ in excess of their IFQ holding , this same methodology would apply. This method meets the intent of Amendment 18, and is consistent with the statements in the EIS concerning the allocation of Class A and Class B IFQ among persons affiliated with IPQ holders.

Comment 26: The proposed rule at § 680.40(h)(4) contradicts Amendment 18 and Congressional mandate in applying the affiliation definition of 10 percent or more processor ownership for the allocation of Class B IFQ. This provision would cause severe economic harm to vessels that have affiliation by processors, stifle investment by QS holders in processing activity, and cause a number of serious problems for the development of a successful crab rationalization program. The final rule should define who can receive Class B IFQ as follows: Class B IFQ will be assigned to all eligible recipients except that Class B IFQ will not be assigned to any person whose delivery of crab is controlled by a holder of PQS or IPQ. Control will be determined based on an annual affidavit by each QS holder submitted as part of the annual application for crab IFQ/IPQ permit. A PQS or IPQ holder does not control QS or IFQ if the skipper responsible for delivery of crab harvested under the QS is contractually able to deliver its harvest wherever they choose without direction by the PQS or IPQ holder.

Response: The response to this comment is addressed in the response to comment 25.

Comment 27: The proposed rule at § 680.40(h)(4)(ii) would prohibit issuance of Class B IFQ to holders of PQS or IPQ or to entities affiliated with such holders. An affidavit requirement is set forth in the proposed rule as a criterion for the issuance of Class B IFQ, as specified in the Council motion and is an important element of accountability and enforceability of the system devised by the Council, and should be preserved. The final regulations should provide for an affidavit process for accountability and enforceability of a system devised by the Council for the issuance of B IFQ. Additionally, processor controlled IFQ holders should not be issued Class B IFQ.

Response: The response to this comment is addressed in the response to comment 25. The affidavit is maintained as the standard by which NMFS will determine affiliation with a processor. The Annual Application for IFQ or IPQ will note what standards meet affiliation thresholds. The accountability for accurately supplying this information to NMFS will rest with the applicant.

Comment 28: The test for determining which harvesters are ineligible to receive Class B IFQ should be whether a PQS holder, by any means whatsoever, controls where the harvester's IFQ are delivered. With respect to this test, control should be evaluated on the basis of criteria similar to those employed by the Maritime Administration when evaluating compliance with the AFA citizenship requirements. By focusing on IPQ holder ownership or control of an IFQ holder to the exclusion of other factors, the use of the affiliation standard at § 680.2 leaves open the possibility that Class B IFQ could be controlled by PQS holders in a manner that contravenes the intent expressed in the Council motion.

In order to fully protect the independence of Class B IFQ, each affiliation evaluation should include consideration of indicia of IPQ holder control of an IFQ holder and over IFQ delivery. Accordingly, the definition of affiliation used at § 680.40(h)(4) should be expanded to include indica of direct or indirect control similar to those used for evaluating affiliation in the AFA context and control of U.S. flag fishing vessels (46 CFR 356.11). In each case, these regulations compel a thorough evaluation of both the ownership of an entity and other control factors that may permit a non-owner to none-the-less exercise control over that entity or its actions. An annual evaluation of this control should occur in conjunction with the IFQ application process, and subsequent to this application, applicants should be prohibited, without prior approval by NMFS, from entering into any relationship with a PQS holder or affiliate that modifies the indica of control already evaluated.

Response: The response to this comment is addressed in the response to comment 25. The rule does not specify that IFQ recipients notify NMFS after the issuance of IFQ and IPQ that they have entered into a relationship with a

PQS or IPQ holder that would result in them becoming affiliated or otherwise resulting in increasing control by the PQS or IPQ holder. NMFS did not make this a requirement for several reasons:

(1) NMFS would not be able to reissue Class A or Class B IFQ once the season has begun. Because the amount of IPQ issued in a fishery is equal to the amount of Class A IFQ, modifying the amount of Class A IFQ issued to a person due to a mid-season change in affiliation would require reissuing IPQ as well and would significantly disturb the operation of the fishery;

(2) In some cases an IFQ holder would not be aware of changes in corporate ownership that could increase the degree of control being exerted by an IPQ or PQS holder. As an example, IFQ could be held by a corporation that is in turn owned by several other corporations. If one of those corporations purchased IPQ, the IFQ holding corporation may not be aware of this change in affiliation unless private contracts stipulated that the IFQ holder be notified that such a purchase had occurred. In any case, the IFQ holder would not be able to exercise control over the actions of this party purchasing the IFQ.

The Annual Application for IFQ or IPQ requires each applicant to annually submit their affidavit and provides a reasonable assurance that if affiliation were to change in mid-season, those changes would be reflected in the affidavit for the following year. NMFS established a time period shortly after the annual application is due until IFQ and IPQ is issued where no transfers of IFQ or IPQ would be approved. This will provide NMFS with time to determine affiliations, the amount of Class A IFQ and Class B IFQ to be issued to each IFQ holder, and issue that IFQ and IPQ. Once issued, transfers could occur that could result in Class B IFQ being transferred to IPQ holders or their affiliates. Because we are modifying the way in which Class A IFQ and Class B IFQ is allocated to PQS or IPQ holders and their affiliates, this would be permitted.

Comment 29: An extremely unreasonable burden would be put on harvesters if processors affiliated harvesters were interpreted to include harvesters who have a gear loan from a processor, a tender contract, or some other unforseen link with a processor that would happen with normal business dealings. Ths could prohibit the harvester from receiving Class B IFQ, participating in arbitration, or joining a cooperative. The solution of signing a control affidavit stating that a processor has no control of landings seems unclear. The final rule should carefully define control and affiliation so as to avoid creating a disadvantage to harvesters or creating a risk of having to sign an affidavit that could later be interpreted as fraudulent.

Response: The response to this comment is addressed in the response to comment 25.

Comment 30: I am a fisherman with a partnership to two different crab vessels that will be participating in the upcoming crab rationalization. On one of these vessels I have been a partner for seventeen years with a group that also owns a small part of a processor. We have a co-ownership agreement that gives me complete control of when and where the vessel delivers. In the last seventeen years I have delivered many times to processors not owned by my partners, the choice has always been mine, as stated in our co-ownership agreement. To deny me Class B IFQ shares under § 680.40(h)(4) gives an unfair advantage to the other unaffiliated vessels who may be able to receive a premium for this crab from outside (non-PQS) buyers. I believe if a vessel could make an annual declaration of control, that any concerns of anti-trust violations could be alleviated, especially with a co-ownership agreement showing the ''affiliated'' partner not in control of decision making for the vessel or its QS/IFQ.

Response: The response to this comment is addressed in the response to comment 25.

Comment 31: The allocation of only Class A IFQ to those vessels that are considered affiliated at § 680.40(h)(4) will disadvantage those minority co-owners that have complete operational control over the deliveries of the vessel and IFQ. The definition of control should be revised to reflect the nature of control at issue, taking into account past operating practices. For instance, a vessels may have partial or full ownership by an entity that also has partial ownership in a processing operation. While these vessels might be considered ''affiliated'' with a processor, they have historically acted independent of the processor and will continue to do so. The operator and in some cases the co-owners of the vessel and have full freedom to deliver wherever they wish, even to the point that a large portion of their QS will be in the Northern Region that their affiliated processor has never had operations. An annual declaration of control is a reasonable method for determining who will receive Class B IFQ.

Response: The response to this comment is addressed in the response to comment 25.

Comment 32: I have had a business relationship with a processing company for 16 years. I have been a partner in the vessel for 12 years. They have never told me where to deliver my catch. I do not fish for their processing company and have not for 14 yrs. I have delivered to a different processor mainly for the last 14 years. My partner's attitude has always been its my choice where to deliver my product. I think I have earned my Class B IFQ and deserve them. I think a simple letter stating that I control where I will deliver my product will be sufficient.

Response: The response to this comment is addressed in the response to comment 25. The factors that this commenter raises would be supplied in the affidavit that he submits each year. If there are sufficient indicia to indicate that control exists, then that person would need to indicate that they are affiliated with an IPQ holder. If not, or if it is unclear, NMFS may request additional information.

Comment 33: Comment strongly supports the dual definition of control (by any means) and the 10 percent affiliation standard identified by NMFS in the proposed rule. The Program was developed with PQS included, which is a new concept in fisheries management. Due to the uncertainties in how this will work, the Council stipulated that only those non-affiliated QS holders would receive the IFQ in an Class A/B IFQ split. This is to benefit the independent QS holders and help to maintain a competitive market place. The concept of a simple affidavit stating that control over deliveries is insufficient. Anyone can say that they are not under the control of a processor. The added 10 percent ownership requirement, which is consistent with other definitions of affiliation by the Council and NMFS throughout the motion and the EIS, is appropriate and needed.

Response: The response to this comment is addressed in the response to comment 25.

Comment 34: Nowhere in the Council motion are recipients of Class B IFQ restricted in nearly so severe a manner as in the proposed rule at § 680.40(h)(4)(ii). The Council motion clearly states that if the QS holder is appropriately able to execute an affidavit stating that no IPQ holder controls where the IFQ is delivered, that QS holder is entitled to receive Class B IFQ. If a QS holder executed such a document, and was discovered to have misrepresented the facts, then that QS holder would be liable for fraud under

federal law. By drawing the proposed rule so narrowly, NMFS has created new restrictions to prevent abuse, restrictions which were neither seen to be necessary by the Council nor which acknowledge the very real penalties which already exist under federal laws for fraud. NMFS should redraft the regulations to accurately reflect the Council motion, bearing in mind that industry participants are already appropriately held to the standard of making accurate representations to NMFS.

Response: The response to this comment is addressed in the response to comment 25.

Comment 35: In order to fully protect the independence of Class B IFQ harvesters, each affiliation evaluation should include consideration of a broad range of indicia of ''affiliation/control'', as well as ''affiliation/ownership''. ''Affiliation/control'' and ''affiliation/ownership'' are two separate tests, both of which must be satisfied in order to be eligible for Class B IFQ. These separate tests are spelled out in the April 2003 Council motion on ''Processor Holdings of Harvest Shares'' It is crystal clear from the motion that the truly ''independent (non-affiliated) harvesters'' are to be the recipients of the full allocation of aggregate Class B IFQ. These are all or nothing tests, without any ''proportionality'' component relative to how much PQ is held, nor the degree of affiliation as a function of degree of processor ownership of the harvester QS holder.

Though the words of the April motion do not indicate a specific 10 percent ownership standard for defining ''affiliation,'' 10 percent was the standard that was used in the RIR analysis that was before the Council when it made the motion.

Some have argued that discussion in section 1.6.4, of the EIS pg. 2–41 suggests proportionality in distributing Class B IFQ to non-fully independent harvesters. However, the EIS was not available to Congress when it acted to require implementation of the program as ''approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003.'' Thus the 'legislative' history on how to allocate Class B IFQ to independent harvests should rest not on section 1.6.4 of the EIS which was not available, but on the RIR which was available in June 2002 and when the Council motion was made in April 2003, and which consistently used a 10 percent affiliation standard to define ''independence'' as well as incorporating a separate test for ''control.''

Response: The response to this comment is addressed in the response to comment 25.

Comment 36: The Council motion included a trigger mechanism for red king crab and snow crab that would end the Class A/B IFQ designations for harvesting QS. If the red king crab GHL exceeds 20 million pounds and/or the snow crab GHL exceeds 175 million pounds, all harvesting shares above those trigger amounts are to be unrestricted or Class B IFQ. If the proposed rule's definition of affiliation remains in place, what shares will affiliated vessels receive when the trigger numbers are reached? Under the proposed rule they cannot receive Class B or unrestricted IFQ. This outcome, while not yet realized in terms of demonstrated GHL, highlights the inconsistency between the proposed regulation and the intent of the Council. Again, the prohibition to receive Class B IFQ to anyone with a 10 percent ownership standard has far reaching consequences. If the regulation remains unchanged, no holder of QS will dare to invest in processing because he will forfeit his ability to receive Class B IFQ. CDQ groups wishing to increase their participation in crab processing and harvesting will not be able to do so. The vessels whose delivery are uncontrolled but have a greater than 10 percent ownership share held by a PQS holder are also penalized. The regulations should be amended to follow the Council intent to utilize the affidavit process to determine control over delivery as the basis for allocating Class A and B IFQ.

Response: Portions of this comment are addressed in the response to comment 25. For the allocation of IFQ when the TAC for Bristol Bay red king crab or snow crab exceeds the specified amount, the final rule specifies at § 680.4(j)(3) that the allocations are made as a modified form of Class A IFQ that would not be subject to delivery to an IPQ holder, but which still have regional designation requirements as provided in Amendment 18. This differs from Class B IFQ, which are not subject to regional delivery requirements

Comment 37: Class B IFQ should not be held by processor-affiliated entities. The important point here, as in the case of cooperatives, is to achieve, through a definition of ''affiliation,'' a result that is consistent with objectives of the both rationalization program and the antitrust laws. Class B IFQ provide leverage for harvesters, who must bargain in a system which provides 90 percent of IFQ shares are Class A IFQ that must be matched to IPQ. This intended leverage on the part of harvesters is compromised, if processor-controlled entities hold Class B IFQ. However, where a harvester is not controlled by a processor, then the rationale for holding Class B IFQ properly applies. The commenter believes that skippers and crew members of vessels in which there is some, but not controlling, processor interest, should enjoy the intended benefit of Class B IFQ.

Response: The response to this comment is addressed in the response to comment 25.

Comment 38: The test for determining which harvesters are ineligible to receive Class B IFQ should be whether a PQS holder, by any means whatsoever, controls where the harvester's IFQ are delivered. With respect to this test, control should be evaluated on the basis of criteria similar to those employed by the MARAD when evaluating compliance with the AFA citizenship requirements. By focusing on IPQ holder ownership or control of an IFQ holder to the exclusion of other factors, the use of the affiliation standard at § 680.2 leaves open the possibility that Class B IFQ could be controlled by PQS holders in a manner that contravenes the intent expressed in the Council motion.

In order to fully protect the independence of Class B IFQ, each affiliation evaluation should include consideration of indicia of IPQ holder control of an IFQ holder and over IFQ delivery. Accordingly, the definition of affiliation used at § 680.40(h)(4) should be expanded to include indica of direct or indirect control similar to those used for evaluating affiliation in the AFA context and control of U.S. flag fishing vessels (46 CFR 356.11). In each case, these regulations compel a thorough evaluation of both the ownership of an entity and other control factors that may permit a non-owner to none-the-less exercise control over that entity or its actions. An annual evaluation of this control should occur in conjunction with the IFQ application process, and subsequent to this application, applicants should be prohibited, without prior approval by NMFS, from entering into any relationship with a PQS holder or affiliate that modifies the indica of control already evaluated.

Response: The response to this comment is addressed in the response to comment 25.

Comment 39: While the affidavit process does go a long way towards defining processor affiliates, an ownership standard is also necessary, such as the MARAD's definition of the

25 percent rule for foreign ownership of U.S. flagged vessels. This standard should be adopted in both the issuance of Class B IFQ and binding arbitration standards.

Response: The response to this comment is addressed in the response to comment 25. The 10 percent standard for ownership was chosen based on the preponderance of its use in Amendment 18 as a means of establishing linkages among various entities for a variety of applications. This same 10 percent standard was used for analysis in the EIS/RIR/IRFA supporting this action.

Comment 40: The proposed rule at § 680.42(b)(1)(i) could limit the benefits from the LLP license buyback to persons that purchased LLP licenses after June 10, 2002, that were put over the use caps by the buyback. Include a provision that would grandfather any initial allocation in excess of the use caps received from LLP licenses acquired after June 10, 2002, and prior to the referendum on the buyback, to the extent that the allocation would not have been in excess of the cap, but for the buyback.

Response: The comment applies to the final rule at § 680.42(a)(1)(i), which addressed PQS issuance. Neither the proposed rule nor Amendment 18 provided specific guidance on the potential implications of the BSAI Crab Fisheries Capacity Reduction Program, or the ''Buyback'' on persons who received catch history by transfer of an LLP license after June10, 2002, that may result in an increased chance of that person receiving an allocation of QS in excess of the use caps established at § 680.42(a). Amendment 18 notes that ''a cutoff date of June 10, 2002, was established for the QS ownership cap grandfather provision.'' Amendment 18 did not provide a specific exemption to this cut off date in the case of the Buyback being approved, although the Buyback was under development at the time that the Council took final action. Additionally, Congressional action on portions of the Buyback were approved prior to Congressional action on the Crab Rationalization Program.

However, the legislation that enacted the Buyback required that a referendum of eligible voters approve the program before it could be enacted. The final results from the referendum were provided on November 24, 2004. Prior to this time, it is reasonable to assume that an individual would not have known if the Buyback would have been approved, or if it would have an impact on the amount of QS a person would be issued based on LLP licenses transferred after June 10, 2002. This November 24, 2004, deadline is after the publication of the proposed rule implementing the Crab Rationalization Program and NMFS was unable to incorporate the potential effects of the Buyback in the proposed rule because it had not yet been approved by the fleet.

Due to the lack of clear guidance on this issue in Amendment 18, but the potentially adverse and unanticipated effect of the Buyback, NMFS may make specific exemptions to the cutoff date in Amendment 18 to accommodate transfers that occurred after June 10, 2002 but prior to the approval of the Buyback by referendum on November 24, 2004. NMFS has modified the final rule at § 680.42(a)(1)(ii)(B) so that any person who applies to receive QS based on an LLP license transferred after June 10, 2002, but prior to November 24, 2004, will receive the amount of QS associated with that transferred LLP license in excess of the use cap for that crab QS fishery if that transfer would not have resulted in that person exceeding the QS use cap for that fishery if the total fishery catch history had not been reduced by the Buyback Program.

Comment 41: The proposed rule does not provide for a modification of the QS ownership caps as a result of recently approved crab vessel buyback. The purpose of the QS cap was to eliminate speculative purchases of QS above a certain level after the Council's motion passed in June of 2002. The buyback will have the impact of increasing QS holders' percentage ownership by about 10 percent. It was generally understood that the buyback would function so that the ownership cap would increase by the same percentage as the increase resulting from the implementation of the buyback and the final rule should reflect this understanding. If not, those who owned QS at the capped level would not be able to receive the benefits of the buyback program.

The buyback was a legal action that took place after the Council's June 2002 motion. The agency does have authority to implement regulations consistent with the Council's intent. In this case, no individual speculated on the purchase of QS that would put them over the cap. Instead, an industry approved buyback program resulted in every participant that remained in the fishery receiving a greater harvest share. It is in full compliance with the Council's intent that the QS cap be raised accordingly.

Response. This response is addressed in the response to comment 40.

Comment 42: The provisions § 680.40(b)(4)(ii)(B) and (E) of the proposed rule prevent the separation of an LLP license from its history. The provision should allow separation in the case of a person acquiring an LLP license to remain in a fishery (§ 680.40 (c)(1)(vii)). Insert a provision that permits the separation of an LLP license from its history to the extent necessary to achieve the purpose of § 680.40 (c)(1)(vii) of the proposed rule.

Response: The commenter is referring to § 680.40(c)(2)(vii) in the final rule. This provision was intended to address the limited circumstance where a person transferred an LLP license for use on a vessel which otherwise would have been qualified to participate in the fishery. NMFS composed the proposed rule to limit this provision rather narrowly. Amendment 18 notes that ''the underlying principle of this program is one history per vessel.'' The specific provision at § 680.40(c)(2)(vii) is intended as a general exemption to this rule. NMFS modified § 680.40(b)(4)(ii)(B) and (E) in the final rule to note that this general principle is not applied for purposes of complying with § 680.40(c)(2)(vii).

Comment 43: The provision at § 680.40(c)(1)(vii) permits a person that purchased an LLP license to remain in a fishery to use the history of the vessel on which the LLP license was used or on which the LLP license was based. The requirement that the vessel using the LLP license have an interim LLP license could limit the application of this provision to situations where multiple license transfers were required to comply with vessel length limits on LLP licenses. Remove the limitation that the LLP license be an ''interim'' license. The rule should be clear that no history may be credited toward two different allocations and that only one history may be credited to an LLP license.

Response: Amendment 18 does not explicitly limit the application of this exemption to persons with an interim LLP license. NMFS had established this limitation in the proposed rule to tightly constrain the applicability of this provision to the general rule that there should be only one catch history eligible to receive an allocation per vessel. NMFS has removed the exemption's limitation that the LLP license be an interim LLP license. Additionally, the provision at § 680.40(c)(2)(vii) clearly states that only one catch history may be credited to a person who applies to receive QS with a permanent, fully transferable LLP license. The catch history used by that QS applicant may be either that derived from that LLP license or the catch history from the vessel which that LLP was transferred and used, but not both.

Comment 44: The January 1, 2002, cut-off date on the provision, in the

proposed rule at § 680.40(c)(2)(vii), that would allow a person who applies to receive QS with an LLP license endorsed for a fishery to choose to receive the QS based either on the landings made by the vessel that was used to qualify for that LLP license or on the landings made by another vessel, is arbitrary. The cut-off date is unlawful and penalizes LLP license holders who purchased licenses after that date to remain in the fishery by not allowing them to receive QS based on the more extensive catch history of another vessel. Section 680.40(c)(2)(vii) should be revised either to strike the January 1, 2002, date or to accommodate the circumstance of a prospective applicant whose interim LLP license was not invalidated, and who did not purchase a permanent LLP license, until after that date.

Response: The January 1, 2002, cut-off date is a provision of Amendment 18. Amendment 18 was approved by the Council and codified by section 313(j) of the Magnuson-Stevens Act. NMFS does not possess the discretion to alter this provision as it exists in statute. Any change to this provision requires an amendment to the Program and should be addressed with the Council. Therefore, NMFS will not make this change in the final rule. The Council did establish a clear control date prior to final decision on this Program to prevent speculative behavior by interim LLP license holders or those without an LLP license to avoid redistributing QS allocations to those who did not have a permanent LLP license.

Comment 45: Clarification of Council intent is necessary to determine whether the Council meant to apply the January 1, 2002, cut-off date to the provision that would allow a person who applies to receive QS with an LLP license endorsed for a fishery to choose to receive the QS based either on the landings made by the vessel that was used to qualify for that LLP license or on the landings made by another vessel. Thus, there appears to be considerable uncertainty concerning how these exceptions to the general rule are intended to operate.

Response: NMFS disagrees that clarification of Council intent is necessary. Amendment 18 explicitly applies the January 1, 2002, date to this provision. Therefore, no uncertainty exists concerning implementation of these exceptions to the basis for QS distribution.

Comment 46: The proposed rule is arbitrary and capricious, does not constitute reasoned decision-making, and is not consistent with standards for agency action set forth in the APA and judicial decisions applying those standards. There is simply no rational connection between the cut-off date and the invalidation/purchase criterion underlying the exemption, and no explanation was given for denying an allocation of QS to persons whose interim LLP licenses were invalidated by NMFS, and who thus did not purchase a permanent LLP license until after January 1, 2002. The Council selected the January 1, 2002, cut-off date in substantial part to accommodate the circumstances of a particular individual, and did not consider the situation of other interim LLP license holders. The Council entirely failed to consider that claims for LLP licenses were still pending before NMFS as of January 1, 2002, and that interim LLP licenses of some participants would not be invalidated until after that date. Further, the cut-off date was selected retroactively, and did not give interim LLP license holders any notice that their ability to continue participating in the fishery would hinge on purchasing a permanent LLP license by a date certain.

Response: This comment has been addressed in a previous response to comment 44.

Comment 47: The January 1, 2002, cut-off date is inconsistent with the National Standards for implementing the Magnuson-Stevens Act, in particular, National Standard 4. The cut-off date unfairly and inequitably denies an allocation of CVO QS to applicants for whom the invalidation/purchase trigger of the exemption did not occur until after January 1, 2002. It penalizes an LLP license holder who exercised its rights under the LLP to appeal an initial administrative determination (IAD) by NMFS, but whose appeal was not resolved by NMFS until after January 1, 2002. A person who did not appeal an adverse IAD, or whose appeal was resolved by NMFS prior to January 1, 2002, may receive an allocation of CVO QS under the exemption, but a person whose appeal was not resolved until after that date may not. There is no rational basis for this distinction.

Response: This comment has been addressed in response to comment 44. Additionally, the January 1, 2002 cut-off date is part of Amendment 18. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program as specified in Amendment 18.

Comment 48: Principles of equal protection and due process, as contained in the Fifth Amendment to the U.S. Constitution, are offended by a regulatory system that makes a distinction between similarly situated persons on the basis of a arbitrary cut-off date. Persons whose interim LLP licenses were invalidated after January 1, 2002, and who then purchased permanent licenses to insure that their vessels would remain authorized to participate in the fishery, are in the same position as persons for whom the invalidation/purchase trigger of the exemption occurred prior to that date. The timing of invalidation of an LLP license was governed by regulations implementing the LLP and largely under the control of NMFS. It simply is not fair to deny an allocation of CVO QS to a person based in the fortuitous timing of NMFS' decision to invalidate an LLP license. A participant in the fishery should not be penalized or denied an allocation of QS because it exercised its rights under the LLP regulations to pursue a claim for an endorsement but NMFS did not resolve that claim until after January 1, 2002.

Response: This comment has been addressed in response to comment 44.

Comment 49: The proposed rule at § 680.40 contemplates an interim LLP license as a condition for a license history exemption contemplated by the Council. By requiring such a license and prohibiting the severability of catch history from an LLP license for initial allocation of QS, the proposed rule excludes a vessel for which there was no such license, but which otherwise would qualify for the exemption. The owners of two of the vessels in question were advised to obtain a complete LLP package or they would be denied a permanent LLP license. They did so, without first being so denied, and thus, were not issued an interim LLP License. The Council did not require an interim LLP License as a qualification for the history exemption, and it was not the intent of the Council to exclude the vessels in question. The final regulations should allow the history exemption for the very limited number of vessels in question. The commenter estimates no more than four LLP licenses will utilize this exemption.

Response: This comment has been addressed in response to comments 42 and 43.

Comment 50: The exception at § 680.40(b)(4)(vii) of the proposed rule permitting issuance of QS to persons who made landings under an interim LLP license by acquired a fully transferable LLP license to preserve their fishing eligibility prior to January 1, 2002, should be narrowly construed to permit the intended beneficiaries of that exception to take advantage of it, but not allow unintended beneficiaries to likewise benefit from the exemption. The commenter is opposed to any broader interpretation of this exemption than is necessary to give effect to the

Council's intent and therefore encourages NMFS to strictly construe the proposed exemption in accordance with the Council's motion.

Response: NMFS has revised § 680.40(b)(4)(vii) in the final rule to limit the applicability of the provision while meeting the intent of Amendment 18. This includes not expanding the dates by which the transfer needed to occur, nor the limitation that only one catch history may be used for purposes of receiving QS.

Crew Sector

Comment 51: The provision at § 680.40(b)(2)(i)(B)(*2*) suggests that regional designations apply to CVC QS ''prior to July 1, 2008.'' The provision should read, ''on and after July 1, 2008.''

Response: NMFS agrees and changed the language at § 680.40(b)(2)(i)(B)(*2*) to read, ''on and after July 1, 2008.''

Comment 52: The provisions in the proposed rule at § 680.40(h)(1) through (7) appear to make no IFQ allocations for CVC QS holders prior to July 1, 2008. The CVC IFQ should not be subject to region or processor landing restrictions during this time period. The provision should make clear that CVC QS holders receive an allocation prior to July 1, 2008.

Response: NMFS agrees and has modified the provisions at § 680.40(h)(1) through (7) in the final rule to clarify how CVC IFQ allocations occur.

Comment 53: The table at § 680.41(c)(1)(i) in the proposed rule is incorrect concerning CVC or CPC in lines (E) and (F). In line (E), the initial recipient of QS is not relevant (no provision authorizing recipients of an initial allocation to receive shares is included for the acquisition of CVC and CPC shares). The only standard for eligibility to receive CVC or CPC shares is that the person acquiring the shares must be an individual that is a U.S. citizen and an ''active participant''. Similarly, in line (F), a cooperative cannot receive shares since it doesn't meet those criteria. The line concerning cooperative acquisition could be deleted. Alternatively, a cooperative could be permitted to receive shares through an individual that meets the requirements, if the agency would like to assume the added administrative burden of tracking those transactions and performance of owner on board requirements. Limit eligibility to receive CVC and CPC shares to individuals who are U.S. citizens and ''active participants.''

Response: NMFS agrees and has restructured the table at § 680.41(c)(1)(v) so that it is clear that a person who wishes to receive CVC or CPC QS or IFQ by transfer must be a U.S. citizen, have met sea time requirements, and be a recent participant in a crab fishery in the 365 days prior to applying for the transfer. The regulations at § 680.41(c)(1)(vi) have been modified so that CVC and CPC IFQ cannot be transferred to a cooperative because the regulations at § 680.42 have been modified so that owner onboard provisions would apply even if the CVC of CPC IFQ is being used in a crab harvesting cooperative. It should be noted that CVC and CPC IFQ may be used in a cooperative by a person who receives CVC or CPC IFQ by transfer and then converts that IFQ for use in the cooperative, provided that the owner on board provisions for use in a crab harvesting cooperative are met.

Comment 54: The table at § 680.42(b)(2)(i) specifies the use caps for CVC and CPC shares. Under the Council motion, these caps are to be equivalent to the CVO and CPO vessel use caps. As written, they are equivalent to the individual CVO and CPO use caps (in most cases one-half of the correct cap). Revise individual use caps for CVC and CPC shares to equal the vessel use caps.

Response: NMFS agrees, Section 1.8.1.9 of Amendment 18 notes that ''C share ownership caps for each species are the same as the vessel use cap for each species.'' The table at § 680.42(b)(2)(i) in the final rule has been modified to correctly reflect Amendment 18.

Comment 55: An eligible captain, who intended to continue fishing but happened to die between seasons of causes unrelated to fishing, should qualify to receive CVC QS. The proposed rule is unclear whether this is the case. Is it the intent of Amendment 18 and the regulations to determine what kind of death will qualify?

Response: This comment is applicable to regulations at § 680.40(b)(3)(C)(2) in the final rule. Amendment 18 notes that ''[f]or captains who died from fishing related incidents, recency requirements shall be waived and the allocation shall be made to the estate of that captain.'' Amendment 18 clearly establishes that the limits under which the recency requirements to receive CVC or CPC QS can be waived. NMFS has interpreted a ''fishing related incident'' as one in which the person died while serving as a member of a harvesting crew in any U.S. commercial fishery. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions as specified in Amendment 18. Any change to this provision requires an amendment to the Program and should be addressed with the Council. The rule has not been modified.

Comment 56: The proposed rule contains many references to CVC (Catcher Vessel Crew) QS and CVS (Catcher Vessel Skipper) QS. Table 2, Eligibility to Receive Catcher Vessel Crew (CVC) Quota Share (QS) and Qualifying Year Periods, in the preamble to the proposed rule, lists 3 eligibility criteria, the second of which limits QS only to skippers. Since only 1 person on each vessel obtained an interim use permit in a given fishery, that person must be defined as the skipper. If the Council's intent was to award CVC QS to crew members, then it should add a phrase in eligibility requirement (2) that says, ''* * * being the individual named on a State of Alaska Interim Use Permit [OR BEING AN INDIVIDUAL WHO DECLARED TAXABLE INCOME FOR FISHING VESSEL PROCEEDS BASED ON IRS FORM 1099 FOR CRAB AND] and who made at least one delivery. If the Council's intent was not to award any CVC QS to crew members, then it should clarify its intent by requesting the removal of all references to CVC QS from § 680, leaving only CVS (Catcher Vessel Skipper) QS.

Response: The terms ''C shares,'' ''Captain's shares,'' and ''Skipper shares'' are used interchangeably in Amendment 18 to refer to QS and IFQ that would be allocated to non-LLP license holders—these terms are called CVC and CPC QS and IFQ by NMFS in the final rule. The preamble to the proposed rule (69 FR 63201) notes that ''NMFS has determined that documentation necessary to allocate Crew QS, called C shares by the Council, would require that these shares be issued to individuals who hold a State of Alaska Interim Use Permit. Most likely, this individual would be the captain; however, the State does not require that the holder of the Interim Use Permit be the vessel captain.'' The phrase ''crew'' does not imply that persons other than those who made legal landings with an Interim Use Permit would qualify to receive CVC or CPC QS, and this is the skipper, or captain of the vessel in most cases. The rule has not been modified.

Comment 57: Highline vessel owners expressed concern that awarding enough CVC QS to crew members to be consistent with crew share history could become too much overhead to vessel operators in the future. This is one likely reason that the Council specified that 3 percent of the QS be issued to skippers, rather than their historic share of about 15 percent. In order to accommodate CVC QS for crew as well

as skippers, without a large negative impact on skippers, it would be fairer to allocate an additional maximum 3 percent for crew member quotas (CVC QS) qualified by evidence from IRS form 1099. This is because the average crew share is about ⅓ of the average captain share, but there about 3 times as many crew as captains. The ratio of CVS QS to actual Skipper share for harvest years could be multiplied by the actual crew share to determine CVC QS.

Response: Amendment 18 expressly limits the amount of QS that can be issued as CVC and CPC QS to 3 percent of the initial QS pool in a crab QS fishery. Issuing more than this amount would directly contradict Amendment 18. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions as specified in Amendment 18. Therefore, NMFS does not possess the discretion to alter the amount of QS that can be issued as CVC and CPC QS as it exists in statute. Any change to this provision requires an amendment to the Program and should be addressed with the Council. The rule has not been modified.

Comment 58: Awarding crew QS only to interim use permit card holders is not fair to crew and captains who may have fished as many or more years but had only forms 1099 for evidence. It is also contrary to the stated intention that these shares are intended to provide long term benefits to captains and crew. Forms 1099 are verifiable evidence. To be consistent with the above intention, IRS Forms 1099 should be admitted as an alternative eligibility qualifier at § 680.40(b)(3)(iii). The following wording should be added: alternatively, crew may establish eligibility by submitting copies of IRS forms 1099 and/or crew settlement sheets for any 5 qualifying seasons. This is simple, fair, and consistent with the intention quoted above. It provides protection for crewmembers who may rely more heavily on crab in the recent years than in the earlier years. One good reason for the above intention is dependence on crab for livelihood of current crew.

Response: This comment has been addressed in response to comment 56. The 1099 IRS form does not indicate that a person made legal landings in a crab QS fishery, only that a person earned income in a fishery. Such a form is not sufficient for determining whether legal landings have been made in the fishery.

Comment 59: Collateral damage of the crab rationalization will hurt most for crewmembers who do not receive CVC QS, who also do not find a new job soon. It would be irresponsible for our industry to shift all of the cost of retraining, placement, and needs-based care onto the Department of Labor and the Department of Health and Social Services at the expense of the general taxpayer. Perhaps a portion of the Cost Recovery tax can be allocated towards reimbursing these agencies for costs of helping unemployed crewmembers.

Crewmembers have neither unemployment insurance nor a severance package. The federal government structured this crab plan in a manner that terminates about 1,000 crabbers or 80 percent of the industry's work force. They probably earned a modal value of $20,000–$30,000 per year crabbing. Most are desirable employees and will find work, but some may remain unemployed or underemployed for a long time. The taxpayers should not be saddled with having to bear the costs of maintaining the thousand crabbers about to be thrown out of work with neither severance pay nor unemployment. This burden on the taxpayers has not been evaluated, nor has the burden on the crew itself. It is as if a giant tax, amounting to a modal value of around $20–30,000 per year is taken out of the crewman's pocket and dropped into the pocket of the vessel owner. There should be a Federal acknowledgment of responsibility for those hurt most by the plan at the end of the section on Cost Recovery and Fee Collection.

Response: The EIS/RIR/IRFA prepared to analyze the effect of Amendment 18 did examine the potential effects of this program on crew. This rule may result in fewer crew being employed as QS holders consolidate their fishing operations for improved economic efficiency—one of the primary goals of the Crab Rationalization Program. The Cost Recovery and Fee Collection portion of this Program is intended to offset the administrative costs and provide funds for loans to entry-level fishermen, including crewmembers who may not have received CVC or CPC QS.

Comment 60: If the crab resource is to be fairly divided among the qualifying participants in the fishery, crew must be included. For the Council to neglect crew is irresponsible. For as long as crews have been crab fishing, a share of the crab resource has been allocated to each crewman. Crew's and owners' catch history are inextricably intertwined. Each vessel's crew and owners have signed a crew share agreement at the start of each fishery that defines the crew's share of the resource. The crew invested sweat equity in the operation by providing at least 10 days to 2 weeks of skilled services maintaining and improving vessels and gear before and after each fishery. As self-employed individuals, the crew paid their own taxes, expecting no fringe benefits normally associated with labor, such as owner contributions to health care plans, pensions, or workman's compensation. The crew suffered the physical brutality of the fishery and put their lives and health at risk whether or not the owner was on board. Without good crews and skippers, it was not possible to achieve a good catch history. Many vessel owners did not spend any time on the Bering Sea during the qualifying years. The crew was there, exposed to the elements. Vessel owners choosing to retire would benefit from a lower tax bill in the future, and the satisfaction of knowing that their net crew allocation provides a fair distribution.

Response: The effects of this Program on crew members were considered during its development by the Council. Please see response to comment 59. The distribution of QS among the various participants in the crab fisheries was discussed and debated extensively during the Program's development. The rule has not been modified.

Comment 61: While recognizing broad safety, conservation, and economic benefits of the rationalization program that is to be implemented by the present rulemaking, the commenter is concerned that many skippers and crew members in the BSAI crab fisheries will be confronted with severe financial dislocation. Adverse consequences will arise from fleet consolidation and coordination through IFQ transfers and fishing cooperatives, from overwhelming vessel owner control of IFQs, and from IPQs. Inevitably, there will be lost employment among skippers and crew members, as vessels are retired or otherwise idled by cooperative agreements. Furthermore, while those skippers and crew who remain in the fisheries will see increased harvests, they will also see the resulting benefits flow overwhelmingly to vessel owners and processors, not to mention those communities that will enjoy development quotas and other, similar advantages.

Response: This response was addressed in the response to comment 59.

Comment 62: There are measures that may be taken by rulemaking, consistent with the Program, the Magnuson-Stevens Act, other applicable law, that would provide some degree of protection and mitigation for skippers and crew members, so that they do not ultimately suffer the worst case. IPQs have a demonstrable potential for

adversely affecting skippers and crews (not to mention, independent vessel owners), and that this challenge should be addressed, as effectively as the law allows, in the present rulemaking. In short, the rulemaking should prevent processors from using the market power deriving from IPQs to achieve excessive leverage in price negotiations that affect not only vessel owners, but also skippers and crew members. Processors must not be provided an opportunity, by virtue of IPQs, to engage in the kinds of market-distorting practices proscribed by the antitrust laws. There are several, specific areas of concern in the proposed rule, with respect to the participation of processors: (1) Participation of processor-''affiliated'' entities in cooperatives, (2) holding of Class B IFQ by processor-affiliated entities, and (3) participation of processors or their affiliated entities in binding arbitration.

Response: The ability of IPQ holders and their affiliates to participate in crab harvesting cooperatives, hold Class B IFQ, and use the Arbitration System, has been addressed in previous response to comments under those subjects, particularly the response to comments 25 and 164. The final rule, Amendment 18, and the Magnuson-Stevens Act all prevent IPQ holders from using the market power deriving from IPQs to achieve excessive leverage in price negotiations and to engage in the kinds of market-distorting practices proscribed by the antitrust laws. Additionally, the economic data collection program was developed to allow such analysis in the future.

Comment 63: Because of the adverse consequences to skippers and crew members, and because the rationalization program offers little of positive economic value to skippers and crew members, relative to vessel owners, processors, and communities, the proposed rule should, as a matter of principle, ensure that such value be maximized to the extent permitted by the Magnuson-Stevens Act and the Council-approved Program.

Response: This Program was intended to provide additional economic benefits and efficiencies to a variety of participants. Achieving economic efficiency is one of several goals that this Program is mandated to meet under the Magnuson-Stevens Act.

Comment 64: The Program has ignored the 1,500 to 2,000 crew members directly involved in the crab fisheries and has failed to include them in the decision-making. Many crew have been involved in crab fishing industry for their entire adult life. The crewmembers are directly responsible for the catch records on every one of the vessels. The Program will create a devastating effect on the livelihood of 50–60 percent of the fleet's crew. Under the Program, every boat will drop a crewmember. Owners with multiple boats will put the IFQ on select boats while their other boats pursue other options. Boats will be bought and sold for no other reason than to obtain their IFQ. What happens to the crewmembers of those vessels? Is it not the responsibility of government in a democratic society to make available programs so that the people they are putting out of work have the opportunity to seek gainful employment in other occupations? Economic stability/benefit is a good thing for everyone, however NMFS simply has not considered everyone involved. NMFS' analysis regarding the effects of the Program on crew members is extremely poor.

NMFS has taken away our life, our livelihood, everything we depend on to live. We may not deserve much but we do deserve to be treated fairly by the Federal Government. Owners and processors get a percentage of IFQ for nothing, give us a percentage for nothing. Maybe buy us out so we can be retrained and enter another occupation.

Response: In developing Amendment 18, the Council analyzed the potential effects of this Program on crew members and provided some allocation of QS to crew who have participated in the fishery. The distribution of the benefits from the program include a variety of industry participants. This Program was developed over a six year period by the Council which included input from crew and other industry participants. The effects of this Program on crew are discussed extensively in the EIS/RIR/IRFA supporting this action.

Comment 65: It is important that the CVC and CPC QS ownership caps in the regulations be listed at the correct levels from Amendment 18, which are equal to the use caps for the vessels in all fisheries. For example, in the case of snow crab and Bristol Bay red king crab, vessel use caps are 2 percent and CVC and CPC QS ownership caps are also 2 percent.

Response: NMFS agrees. This comment has been addressed in response to comment 54.

Comment 66: The provision in the proposed rule at § 680.42(b)(1)(iii) creates ambiguity concerning non-individuals holding CVC IFQ and QS. CVC IFQ and QS may be held only by individuals. Limit CVC and CPC share holdings to individuals.

Response: NMFS agrees, the language in the final rule at § 680.42(b)(1)(iii) has been clarified to note that CVC and CPC IFQ and QS may be held only by individuals who are qualified to do so. This change better reflects the provisions established in Amendment 18.

Processing Sector

Comment 67: The proposed rule does not correctly implement the Council's intent for this fishery concerning the community of Adak. The clear intent of the Council was that 50 percent of the WAI golden king crab QS was to be processed in the WAI region. The problem has to do with some confusion in the Council's motion because harvesting history for WAI golden king crab does not match the processing history and does not match the recent golden king crab processing activities in Adak. The proposed rule does not meet the Council intent to process 50 percent of the IPQ in the WAI region. The fact that Adak is excluded from the ROFR provision suggests the Council felt ROFR was unnecessary because they were guaranteed 50 percent of the WAI golden king crab could be processed without IPQ. Another inconsistency is that Adak would be precluded from acquiring 50 percent of the IPQ by the 30 percent ownership cap. If inadequate IPQ is available for lease or purchase, the requirement to process 50 percent of the WAI golden king crab in the western region can only be achieved by allowing the crab to be processed without IPQ.

Response: Persons who apply for PQS and receive PQS in excess of the use caps will be grandfathered in at that amount as long as that amount is not based on transfers of processing history after June 10, 2002. The rule has not been modified. Neither Amendment 18 nor the rule require that only one PQS or IPQ holder hold 50 percent of the PQS or IPQ in the Western Aleutian golden king crab fishery. The rule establishes that 50 percent of the total PQS and IPQ issued in this fishery must be processed West of a line at 174° W. longitude, as established in Amendment 18. The remaining PQS or IPQ does not have a regional designation and may be used West of 174° W. longitude as well. Nothing in this rule restricts the use of undesignated PQS or IPQ in Adak. In addition, at § 680.40, the final rule requires that 50 percent of the CVO and CVC QS in the Western Aleutian golden king crab fishery be designated for delivery West of a line at 174° W. longitude. This provision would not be implemented for CVC QS until July 1, 2008, as established under Amendment 18.

Comment 68: The provision in the proposed rule at § 680.40(e)(1)(i) and

(e)(1)(ii)(D) refers to the Total Processing Denominator (TPD) for each year. When taken together with the reference to the ''average percentage of the TPD for a person'' at (e)(1)(ii)(D), the provisions suggest that the ''average annual percentage'' approach to determining allocations will be used for processors, which is not correct. Clarify method of allocation of processor individual allocations is total individual qualified history divided by all qualified history.

Response: NMFS agrees and has clarified the provisions at § 680.40(e)(1)(i) and (e)(1)(ii)(D) in the final rule to note that a person's initial allocation of PQS is equivalent to that person's total qualifying legal processing history divided by all qualified history in that crab QS fishery.

Comment 69: The provision at § 680.42(c)(4) prevents the issuance of IPQ in excess of the ''IPQ cap'' in the Bristol Bay red king crab fishery and the Bering Sea snow crab fishery. It is very confusing to have this provision in the section on ''use limitations'' since it is not a use limit, but an allocation limit. The provision should likely be moved to § 680.40(h) and/or (i), which concern the allocation of Class A IFQ and IPQ.

Response: NMFS agrees and has moved the provision from § 680.42(c)(4) to § 680.40(h)(10) and § 680.40(j)(3), IPQ issuance limits, to avoid confusion with the use caps at § 680.42.

Comment 70: The legislation authorizing the program provided at section 313(j) of the Magnuson-Stevens Act provides that IPQ should not create a right, title, or interest in any crab, until that crab is purchased from a fisherman. No similar language appears in the regulation. Include the language from the legislation in the regulation at § 680.40(l).

Response: NMFS agrees. Section 680.40(l) notes that the QS and PQS permits issued under this Program do not constitute absolute rights to the resource. These limitations extend to the IFQ and IPQ resulting from the QS or PQS. NMFS modified the final rule at § 680.40(1) to more accurately reflect the legislative language at § 313(j)(7) of the Magnuson-Stevens Act.

Comment 71: Section 313(j)(2) of the Magnuson-Stevens Act states that if the Secretary determines a processor has leveraged its IPQ to acquire Class B IFQ, the processor's IPQ shall be forfeited. If a specific regulatory re-statement of the ability of the Secretary to forfeit IPQ held by a processor that have acquired Class B IFQ is not included in the proposed rule, it should be included in the final rule.

Response: The regulatory text in the final rule at § 680.7(f) states that it is a prohibition to use IPQ to acquire an interest in Class B IFQ. The specific requirement to forfeit those shares would be determined after investigation by NOAA Enforcement. Nothing in these regulations restricts the ability of NOAA Enforcement to require divestiture of PQS or IPQ if a person leveraged IPQ to acquire ownership interest in Class B IFQ.

Comment 72: Section 680.42(b)(2) creates an ambiguity concerning individuals holding PQS and IPQ being exempt from the cap. Only corporations and other non-individuals that directly hold PQS and IPQ are exempt from this cap. In addition, the exemption should be limited under the cap described at (b)(4), not generally. Section 680.42(b)(2) should read, ''Except for corporations and other non-individuals as provided at (b)(4) and CDQ groups as provided for at (b)(3).''

Response: NMFS agrees. These comments now refer to the final rule at § 680.42(a)(2). Amendment 18 notes that ''[a]ll individuals and subsidiaries will be subject to the general caps on QS holdings.'' NMFS modified the final rule at § 680.42(a)(2) so that it is clear that except for corporations and other non-individuals and CDQ groups, the general cap that applies to QS and IFQ use would apply. This means that individuals that are holders of IPQ, or an affiliate, but not a direct corporate entity holding PQS would be subject to the QS and IFQ use caps at § 680.42(a)(2)(i).

Comment 73: (C48–80) For PQS holders, the AFA-style 10 percent limited threshold rule is used for determining compliance with the vertical integration cap on IFQ holdings. Under this approach all QS and IFQ holdings of the holder of the PQS and all of its affiliates are counted toward the cap. The application of this rule is not clear from the proposed rule at § 680.42(b)(4). A second issue arises in this provision of the regulation because this is an additional cap to the cap at § 680.42(b)(2)(i). This cap supersedes the cap at § 680.42(b)(2)(i) only for a corporation or other non-individual directly holding the PQS. In other words, all individuals will still be subject to the individual caps at § 680.42 (b)(2)(i). Clarify the method of calculating holdings and the application of the cap and the limited exemption.

Response: NMFS agrees and has modified the final rule at § 680.42(a)(4) accordingly. Amendment 18 notes that ''[v]ertical integration ownership caps on processors shall be implemented using both the individual and collective 10 percent minimum ownership standards for inclusion in calculating the general cap'' which is ''similar to the AFA common ownership standard used to implement ownership caps.'' The intent behind these phrases are clarified in the EIS/RIR/IRFA. This approach would function so that a non-individual person that holds PQS would be limited to a QS and IFQ cap that would be calculated based on the sum of all QS or IFQ held by that PQS holder and all QS or IFQ held by any entity that is affiliated with that PQS holder. This method would comply with the Council's intent in this provision that a corporate entity would have an exemption but that entities linked to that PQS holder through common ownership would be considered as holding QS or IFQ for purposes of applying this higher cap. The commenter is correct in that the use caps at § 680.42(a)(1)(i) would apply to all individuals, or other entities that do not hold PQS. Section 680.42(a)(4) has been modified.

It should be noted that this ''AFA 10 percent threshold'' method of computation is used only for purposes of computing the amount of QS and IFQ holdings that apply to QS and IFQ use caps for non-individuals that hold PQS. In the case of individuals who hold PQS, other persons that hold QS or IFQ but not PQS, or CDQ groups, QS and IFQ use caps are computed using an ''individual and collective'' rule. Under this standard, the amount of QS or IFQ that is computed as applying to a person is equal to the sum of the QS or IFQ held by the person and an amount equal to the percentage of holdings by that person in any entity in which that person has an interest. As an example, if an individual held QS and a 20 percent interest in another entity that held QS, the ''individual and collective'' rule would sum the holdings by that individual and 20 percent of the QS holdings by the other entity for purposes of computing how much QS that individual could hold. The same method would be used for IFQ holdings and IFQ use cap calculation. This ''individual and collective'' standard is similar to the one applied in the halibut and sablefish IFQ program for computing QS use caps under that program. The ''individual and collective'' rule does not require that a minimum of 10 percent ownership be triggered to count any collective holdings by a person.

Comment 74: Caps on PQS and IPQ should use the AFA-style 10 percent limited threshold rule, not the individual and collective rule. Under this approach all PQS and IPQ holdings of the holder of the PQS and all of its affiliates are counted toward the cap.

The application of this rule is not clear from the proposed rule at § 680.42(c)(1). Clarify the method of calculating holdings.

Response: NMFS agrees. The comment now refers to the final rule at § 680.42(b)(3). Amendment 18 notes that ''PQS ownership caps should be applied using the individual and collective rule using 10 percent minimum ownership standards for inclusion in calculating the cap.'' The application of this standard is similar to that which is being used in the application of the rule for calculating the amount of QS or IFQ that can be used by a non-individual that holds PQS. This approach would function so that a non-individual person that holds PQS would be limited to a PQS and IPQ cap that would be calculated based on the sum of all PQS or IPQ held by that PQS holder and all PQS or IPQ held by any entity that is affiliated with that PQS holder. This method would comply with the Council's intent that PQS or IPQ holder through common ownership would be considered as holding PQS or IPQ for purposes of applying the PQS use cap to that person at § 680.42(b)(3).

Comment 75: Processing quota share, at § 680.40(e) of the proposed rule, is also calculated as a simple average, when Council intent was a weighted average. Total Processing Denominator (denominator is defined as ''pounds * * * in each qualifying year'') appears to be an annual number. Both the pounds for each person and pounds for the TPD should be summed over the history years, and then divided to obtain the percentage.

Response: The response to this comment has been addressed in response to comment 68.

Comment 76: Cooling-off period waiver in the proposed rule, at § 680.42(c)(5), should be brought into compliance with Amendment 18. The ECC may not waive the cooling-off period, even for a temporary move. The ECC may waive the ROFR after the two-year period expires, as specified in the Council motion on civil contract terms for ROFR. Amendment 18 allows a community group or CDQ group to waive any right of first refusal.

Response: The cooling off period established in Amendment 18 is reflected in the final rule at § 680.42(b)(4). The ''cooling off'' period that is established is based on the language used in Amendment 18. A community as defined for the ''cooling off'' period cannot waive the cooling off period, and nothing in these regulations would permit them to do so. An IPQ holder may use IPQ outside of a community during the ''cooling off'' period only under the limited exemptions provided by Amendment 18 and in § 680.42(b)(4) for a small amount of IPQ and to address unforseen circumstances.

Comment 77: Council intent was that any PQS earned based on processing history in the West region would be designated as west region PQS. However, the regulations at § 680.40(e)(2) state that a person will receive only west PQS if, at the time of the application, that person owns a crab processing facility that is located in the West region.

Response: Amendment 18 notes that the allocation of West regionally designated PQS in the WAG crab QS fishery would be made to ''to participants with processing facilities in the West.'' This statement is distinct from the criteria used in designating the allocation of PQS in the other fisheries. The allocation criteria here are explicit in that the allocation of West region QS is based on the ownership of a processing facility in the West region, and NMFS has determined this to mean ownership of a processing facility in the West region at the time of application. The rule has not been modified.

Comment 78: Public Law 108–199 Section 801(j)(6) states that the Secretary may revoke any IPQ held by any person found to have violated a provision of the antitrust laws of the United States. If a specific regulatory re-statement of the ability of the Secretary to revoke IPQ held by a person found to have violated antitrust law is not included in the proposed rule, it should be included in the final rule.

Response: NMFS does have the ability to revoke any IPQ held by a person that has violated an antitrust law of the United States as granted by this provision. This statutory authority was not part of the proposed rule but is an authority that exists under section 313(j) of the Magnuson-Stevens Act. An explicit regulatory statement was not placed in the proposed rule because it was not deemed necessary to reiterate the authority that NMFS has to revoke IPQ under these conditions. The rule has not been modified, but NMFS has the statutory authority to revoke IPQ for antitrust violations if necessary after review under the Magnuson-Stevens Act.

Comment 79: The Council motion recommends that NOAA Fisheries award PQS to processors that purchased crab during the relevant processing history years based on the entity that signed the fish ticket and did not base the award of PQS on the location where the crab was physically processed. The Council recognized and acknowledged the use of custom processing and the regulation correctly reflects that Council intent in its definition of the initial award of PQS. The regulations do not specify how custom processing affects processor use caps; IPQ transfers; and community protection provisions. We believe that in order to achieve the efficiencies envisioned, custom processing will be used extensively in the future. Therefore we believe the final rule should treat custom processing as follows: Custom Processing and IPQ leasing should each be counted against the use cap of the processor doing the physical processing. For example, PQS holder X holds IPQ and purchases crab, which is processed by PQS holder Y. PQS holder X is subject to the use cap because it holds the IPQ. Processor Y's use cap calculation should include both its own IPQ and the amount that it is physically processing for PQS holder X.

Response: Amendment 18 notes that ''limits on ownership and use would count any crab custom processed by a plant toward the cap of the plant owner. The application of the cap to custom processing is intended to prevent consolidation which could occur if custom processing is not considered.'' The proposed rule does not require that the processing which is occurring at a facility be counted against the owner of the facility if the owner also holds IPQ. Under Amendment 18, any IPQ that is ''custom processed'' at a facility would be counted against both the IPQ holder (the custom processor) and the IPQ holder that owns the facility. This accounting is potentially problematic in that there may be cases in which a processing facility is owned by multiple IPQ holders, or is not owned by an IPQ holder at all. In cases of multiple IPQ holders owning a processing facility, it is not clear whether the amount of IPQ crab custom processed at a facility would be counted against all IPQ holders on a pro rata basis, or in proportion to their ownership in the processing facility. It would also create a situation where IPQ use would be ''double counted'', resulting in less IPQ being available to Class A IFQ holders that is needed.

To implement this provision of Amendment 18, NMFS modified the final rule at § 680.7(a)(7) to note that no IPQ holder may use more IPQ crab than the maximum amount of IPQ that may be held by that person including all crab that are received by any RCR at any shoreside crab processor or stationary crab processor in which that IPQ holder has a 10 percent or greater direct or indirect ownership interest. Therefore, a person that holds IPQ is limited to an

IPQ use cap based on: The sum of all IPQ held by that IPQ holder and all IPQ held by any entity in which that PQS holder has a 10 percent or greater direct or indirect ownership interest; and any IPQ crab that is received at a shoreside crab processor or stationary floating crab processor owned by that IPQ holder.

Ownership of a processing facility is defined as having a 10 percent or greater direct or indirect interest in the processing facility. This modification better comports with the intent of Amendment 18. NMFS will not directly collect ownership information on processing facilities, however, any IPQ holder that owns a processing facility is responsible for maintaining records adequate to ensure that the IPQ use caps are not exceeded through custom processing arrangements established by IPQ holders that also own processing facilities. NMFS will be able to account for processing facility ownership using the EDR required under this Program, should a specific facility or IPQ holder need to be investigated.

In addition, NMFS has added a prohibition to the final rule at § 680.7(a)(8) so that in those cases where a processing facility is not owned by an IPQ holder, no RCR or group of RCRs may receive more than 30 percent of the IPQ in any crab QS fishery at any shoreside crab processor or stationary crab processor. This limitation meets the requirements of Amendment 18 to limit the amount of processing that could be done at any one facility and limits the ability for IPQ holders to simply divest themselves of ownership in a processing facility as a means of avoiding the limitations on IPQ use through custom processing arrangements.

Comment 80: Lease of IPQ or physical processing outside the community should each count for purposes of community protections and should require agency transfer approval.

Response: Use of IPQ outside of an ECC would be considered as subjecting those IPQ shares and the underlying PQS to the cooling off and ROFR provisions as revised in this final rule. Any transfer of IPQ for use outside of that ECC subject to the cooling off provision or ROFR would need to be approved by NMFS under the current regulations. The rule has not been modified.

Comment 81: Processor interests should be made entirely transparent to authorized fisheries managers and enforcement officials, as well as to the antitrust authorities, and all available tools for preventing and punishing anti-competitive processor behavior should be employed aggressively. The important safeguards contemplated by the Magnuson-Stevens Act and the antitrust laws, and reflected in the proposed rule, should be preserved.

Response: This Program requires extensive reporting of data by both harvesters and processors in order to ensure that existing antitrust laws are not violated and that the goals of this Program are met. These data can be used to investigate activities of concern.

Comment 82: The allocations of PQS are not equitable because processors with history processing crab in Alaska that do not meet the eligibility qualifications at § 680.40(d)(3) would not receive PQS. Specifically, if a processor lost its facility due to fire, and did not make $1,000,000 worth of improvements to that facility, it would not qualify for the hardship exemption for eligibility at § 680.40(d)(3)(ii)(B). These regulations eliminate competition and prevent boats from delivering to a native-Alaskan owned processor with a long history of processing crab in the BSAI area.

Response: NMFS encourages all processors to complete an application for QS or PQS. The eligibility requirements in the regulations are provisions of Amendment 18. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions as specified in Amendment 18.

Comment 83: The unique concentration of PQS holders in the golden king crab fishery presents a problem in terms of economic efficiencies the Program envisioned for processing in small fisheries. Two processors will receive greater than three-quarters of the initial PQS pool in the EAI golden king crab fishery, creating a problem with the 30 percent use cap. This is similar to the snow crab fishery where a few processors will hold north region PQS. In that case, the Council allowed an IPQ use cap up to 60 percent of the IPQ issued with a north region designation. The commenter requests an amendment that allows for an IPQ use cap of 60 percent of the IPQ issued in the EAI golden king crab fishery. This would allow processors to achieve efficiencies envisioned by the Program.

Response: Persons who apply for PQS and receive PQS in excess of the use caps will be grandfathered in at that amount as long as that amount is not based on transfers of PQS catch history after June 10, 2002. The rule has not been modified.

Crab Harvesting Cooperatives

Comment 84: The requirement at § 680.21 of the proposed rule, that prohibits participation in crab fishery cooperatives by a QS holder who also holds PQS or IPQ, is affiliated with holders of PQS or IPQ, processes Class B IFQ, or is affiliated with a person that processes Class B IFQ, is overly restrictive and does not meet the intent of the overall Crab Rationalization program. Section 680.21 assumes that ''harvest cooperatives'' under the Council motion are intended to be FCMA cooperatives. This interpretation appears to have led NMFS to conclude that any processor affiliated QS holder could not join a cooperative. The Council motion intended cooperatives for the limited purpose of coordinating harvest activity to allow all holders of harvest shares to achieve efficiencies and should not require FCMA qualification. We also note that the December 3, 2004, memorandum of NOAA General Counsel on Harvesting Cooperatives under the Crab Rationalization Program clarifies that the cooperative system intended by the Council can be implemented consistent with antitrust law, providing NMFS with the latitude to address this critical flaw.

It is by no means clear that the Council, or the Congress, intended that cooperatives for BSAI crab harvesting should be only those as provided for in the FCMA for joint marketing purposes, as prescribed in the proposed rule at § 680.21. The language of the Council motion distinguishes and requires FCMA cooperatives in the arbitration program, the only portion of the motion in which a cooperative would engage in negotiation. In the arbitration section of the motion, FCMA cooperatives are distinguished as the only cooperatives that may negotiate on behalf of their members. In addition, the motion specifically identifies the role of its harvest cooperatives. The Council motion establishes a ''harvesting cooperative'' that is intended to coordinate harvests of its members' IFQ to achieve efficiencies in the fisheries. The terms that govern these harvesting cooperatives are delineated in the Council motion. The motion and clarification describe a system of coordination of harvests that would be used to pursue fleet consolidation. Similarly, the clarification describes systems of leasing and use of allocations. No mention of marketing or negotiation activities is made in either the motion or clarifications.

The Council envisioned all crab harvesting vessels having the opportunity to form harvesting cooperatives to achieve the benefits of fleet consolidation through the operation of leasing and transferring

crab harvesting quota share among the cooperative members. In fact, the Council motion encourages the formation of harvesting cooperatives by including incentives such as exemption from individual use caps for cooperative members and by allowing only cooperative members the ability to lease quotas five years following implementation of the crab rationalization regulations. The only distinction is that affiliated vessels cannot participate in price formation. It is critical to note that non-FCMA operational cooperatives, comprised of non-processor affiliated vessels, processor-affiliated vessels and processors, were envisioned by the Council to maximize operational efficiencies and net national benefits, and to broadly distribute those rationalization benefits across harvesters, processors and fishery-dependent Alaska coastal communities.

Participants in both federal and state crab rationalization working groups have always proceeded with an underlying assumption that all harvesters—both affiliated and non-affiliated—would be allowed to join harvesting cooperatives to achieve efficiencies and lessen the enforcement burden. Also, as the Council reiterated at its December 2004 meeting, it intended for all crab harvesting vessels to have the option to join crab harvesting cooperatives.

Given the limited scope of harvest cooperative actions and the distinction of FCMA cooperatives in the arbitration provisions of the motion, harvest cooperatives should not be required to be FCMA cooperatives and NMFS should remove requirement that harvest cooperatives be FCMA cooperatives.

The proposed rule has taken a conservative, zero-risk approach to antitrust that is inconsistent with Council intent. In so doing, the proposed rule, at § 680.21, defines the entire universe of cooperatives as only program-compliant FCMA (bargaining) cooperatives that need limited antitrust exemption. The preamble explains the proposed rule's cooperative membership restriction is due to Congress' inclusion in its codification of the Council plan amendments, that nothing in their approval shall be construed to create an implied or explicit exemption from the antitrust laws and regulations. The proposed rule interpreted that statutory language to mean that the only cooperatives available to the crab harvesting vessels are those allowed under the FCMA.

The justification in the proposed rule, at § 680.21, for FCMA status is flawed. The proposed rule claims crab harvesting cooperatives are FCMA cooperatives because they combine and collectively manage their crab IFQ. This claim in untrue. All crab harvesters receive QS prior to forming a cooperative. The QS for each participant in a harvesting cooperative has been decided and NOAA will issue the QS. The cooperative members will not do the segmentation of the crab resource. They need no FCMA limited antitrust exemption to collectively catch because such activity is not engaged in market segmentation. They only need FCMA protection when engaged in collective bargaining or binding arbitration. Additionally, NMFS' position in the proposed rule ignores the fact that antitrust law already applies to all industry participants, that this fact was reiterated in Senator Stevens' statutory language, and that the simplest way to avoid any additional concerns would simply be to create a rule prohibiting any affiliated vessel from participating in price negotiations. The current regulation disregards the critical distinction in the Council's motion between FCMA cooperatives and non-FCMA harvesting cooperatives, treating all cooperatives as FCMA cooperatives and thereby limiting the ability of processors and their affiliates to realize the benefits of coordination of harvest activity that could be achieved through the harvest cooperative structure the Council has developed. The final regulations should be amended to allow the fullest participation possible by processor affiliated vessels in crab harvesting cooperatives so that each crab QS holder is able to meet the goals of crab rationalization.

The penalties imposed on the processor-affiliated vessels prohibited from cooperative participation under the proposed regulation are severe. Requiring crab harvesting cooperatives to be FCMA cooperatives causes the following problems: (1) Fishermen that cannot join a cooperative because of their affiliated partners are severely disadvantaged from their fellow fishers; (2) without the ability to form cooperatives, many of the benefits of the entire rationalization program will be lost to many vessels which find themselves, in one way or another affiliated with a processor; and (3) vessels that are affiliated with processors would be unfairly penalized by not being allowed to ''stack'' their quota on vessels, be restricted to vessel use caps, and face more restrictive transfer provisions. Such vessels will not be able to achieve the operational efficiencies intended by cooperatives such as lower operational costs (dramatic savings on fuel, harvesting equipment, insurance), higher product recovery rates, higher quality and more diverse finished products, reduced bycatch of non-target species, and reduced environmental impact. Additionally, processors and processor-affiliated vessels would not be allowed to receive Class B IFQ. Other lost rationalization benefits include: improved management capability for harvests resulting in overage/underage; improved management capability for dealing with sideboard limitations; reduced administrative and enforcement costs; and improved safety (fewer and safer vessels fishing). The Council did not intend these benefit deprivations that derive from the errant definition of ''cooperatives'' used in the proposed rule.

We believe requiring all cooperatives to be FCMA cooperatives is neither warranted nor encouraged by antitrust law. We believe harvesting cooperatives can include vessels affiliated with holders of PQS. The antitrust laws are intended to prohibit anti-competitive behavior among competitors. Such conduct typically includes agreements among competitors to (a) increase prices or (b) reduce output in order to increase prices. At the same time, the antitrust laws encourage business to achieve efficiencies by lowering costs. Crab harvesting cooperatives and the harvesting allocation agreement among vessels, (including vessels affiliated with PQS holders) are not anti-competitive. They do not reduce output and are incentivized to maximize their production. A harvesting cooperative will simply divide the harvest of its government allocated QS in a manner to maximize efficiency. The efficiencies are reflected in lower operational costs (dramatic savings on fuel, harvesting equipment, insurance), higher product recovery rates, higher quality and more diverse finished products, improved safety, reduced bycatch of non-target species, and reduced environmental impact.

Given that the antitrust laws do not summarily condemn, and, indeed, encourage, cooperatives, associations, and other joint ventures that, as here, do not involve price fixing or other plainly anti-competitive practices, adopting a proposed rule that imposes a per se ban on such cooperatives in the BSAI is without justification. That is especially so in this instance because the underlying rationale for such a ban is the mistaken notion that such cooperatives in fact violate—or at least pose a significant risk of violating—the antitrust laws. For this reason alone, the proposed rule should not prohibit crab

processor-affiliated participation in crab harvesting cooperatives, as defined by the rule.

Participation of processor-affiliated entities in cooperatives should be permitted only where there is no price negotiation, that is, only in cooperatives that are established solely for operational fishing purposes. Processor affiliated vessels that form ''non-FCMA'' cooperatives should be prohibited from participating or voting in the price formation process under the Binding Arbitration system. In other words, participation in cooperatives authorized by the FCMA must be restricted to entities that are not affiliated with processors. By this means, the safety, conservation, and economic efficiency objectives of the rationalization program can be realized through operational cooperatives, without compromising competition that is the purpose of the antitrust laws to protect, or reducing the market leverage accorded harvesters not controlled by processors through FCMA cooperatives.

Section 680.21(b)(3) of the proposed rule that requires crab harvesting cooperatives to be established under the FCMA was based on antitrust concerns. However, a cooperative formed for the purposes of making harvesting more efficient would by analyzed under the ''rule of reason'' antitrust doctrine. Under this doctrine, a cooperative would be legal unless the pro-competitive benefits of the venture and its practices are outweighed by the anti-competitive effects that the arrangement cause.

Harvesting cooperatives that include vessels affiliated with processors greatly increase the efficiency of harvesting crab and pose no threat to competition. Simply put, excluding processor affiliated vessels from the ability to join cooperatives would deny a substantial percentage of the fleet many of the benefits contemplated by rationalization. As long as processor affiliated vessels are not involved in the negotiation of prices with the processor to whom they are affiliated, there is no anti-competitive impact from these cooperatives.

Non-FCMA operational cooperatives need no limited antitrust exemption because they involve neither market segmentation nor price formation and they pose no significant anti-competitiveness risks. Segmentation in the form of crab IFQ and IPQ occurred by statute, unlike the Pacific whiting cooperatives or AFA cooperatives, in which segmentation (issuance of IFQ) was conditional on cooperative formation and collective catching behavior. Therefore, we urge that the regulations be modified to allow processor affiliated vessels to be members of crab harvesting cooperatives.

In light of the explicit Congressional intent that crab harvesting cooperatives not be given a special antitrust exemption, non-FCMA cooperatives must be strictly scrutinized to ensure compliance with applicable antitrust laws. As is the case for AFA catcher-vessel cooperatives, crab harvesting cooperatives whose membership includes one or more affiliated harvesters should be required to seek and obtain a favorable business review by the Department of Justice, Antitrust Division. However, because (unlike under the AFA) there is no argument that crab harvesting cooperatives have special status under antitrust laws, non-FCMA harvesting cooperatives should also be subject to initial and on-going scrutiny that is more stringent than that applied to AFA cooperatives.

The regulations should allow other forms of cooperatives, subject to review by the Department of Justice. In the first year of the crab harvesting cooperatives' existence, NMFS should condition the allocation of IFQ to a non-FCMA cooperative on that cooperatives' submission of a business review request to the Justice Department, and should require a copy of the business review request be submitted to NMFS with the cooperative's IFQ application. In subsequent years, the cooperative should be required to provide evidence of a favorable business review and should also provide both the Department of Justice and NMFS with prompt notice of any changes in its membership, governance, or activity. Finally, since non-FCMA cooperatives are not entitled to any antitrust exemption, the final rule should contain an explicit acknowledgment that NMFS's allocation of IFQ to a cooperative whose membership includes one or more affiliated harvesters in no way constitutes a determination that the cooperative was formed or is operating in compliance with applicable antitrust law. NMFS's allocation activity would not therefore provide a cooperative with an affirmative defense against antitrust liability, and the cooperative and its members would bear full responsibility for any violation of antitrust law.

The two types of cooperatives intended by the Council should be defined in the regulations at § 680.2: (1) For program-compliant FCMA cooperatives, a definition of voluntary cooperatives consisting only of harvesters with no affiliation to processors that are organized for the purpose of bargaining and negotiating price, per the Council intent, and (2) for program-compliant non-FCMA cooperatives, a definition of voluntary cooperatives consisting of harvesters that are not affiliated with processors, processor-affiliated harvesters and one or more processors. The purpose of the second type of cooperative is to capture operational efficiencies in harvesting and processing, and to broaden the rationalization benefits to both sectors, per the Council intent. Inclusion of program-compliant non-FCMA cooperatives will require modifying some text throughout the regulations, especially at § 680.21, in order to correctly explain the intended program operation and benefits.

Response: NMFS has removed the requirement that crab harvesting cooperatives under § 680.21 be FCMA cooperatives and has modified the structure of the crab harvesting cooperative regulations to allow the formation of crab harvesting cooperatives by affiliated entities for the sole purpose of harvesting their crab IFQ. NMFS also has added regulatory definitions of crab harvesting cooperatives and FCMA cooperatives to § 680.2 of the final rule. The final rule, at § 680.21, continues to require FCMA cooperatives for the price arbitration system.

The rationale for the proposed requirement that crab harvesting cooperatives under § 680.21 be FCMA cooperatives is provided in the preamble to the proposed rule (69 FR 63226–63227). Subsequent to publication of the proposed rule, NMFS determined that affiliated harvesters could form an association to pool their crab QS and harvest the QS from one vessel with the likelihood that such activity would not violate the antitrust laws. Under the ''Antitrust Guidelines for Collaboration Among Competitors,'' issued by the Department of Justice (DOJ) and the Federal Trade Commission (FTC), affiliated and non-affiliated harvesters could pool their crab QS and harvest it from one vessel with the likelihood that such activity would not be an antitrust violation as long as the activity of the cooperative promotes efficiency, does not have an anti-competitive effect, and is otherwise found to comply with the guidelines.

NMFS has decided that allowing holders of QS/IFQ that also holds PQS/IPQ or are affiliated with holders of PQS/IPQ to join crab harvesting cooperatives complies with Amendment 18 and Council intent in designing the Program. With this change, more participants will be able to participate in crab harvesting cooperatives for the

purpose of harvesting their IFQ and benefit from efficiencies gained through cooperatives.

NMFS agrees with the commenters that crab harvesting cooperatives that are not formed in accordance with the FCMA will not benefit from the antitrust immunity FCMA cooperative formation provides. Some activities by members of non-FCMA crab harvesting cooperatives could, under some circumstances, violate the antitrust laws. NMFS recognizes that withdrawing the requirement that crab harvesting cooperatives be formed under the FCMA will increase the risk of possible antitrust violations for the participants in the crab rationalization program who are not members of an FCMA cooperative. Therefore, NMFS strongly encourages members of non-FCMA crab harvesting cooperatives to consult counsel before commencing any activity if the members are uncertain about the legality under the antitrust laws of the crab harvesting cooperative's proposed conduct. NMFS has included a sentence in the final rule that includes this recommendation at § 680.21, as well as a statement that issuance by NMFS of a crab harvesting cooperative IFQ permit to a crab harvesting cooperative is not a determination that the crab harvesting cooperative is formed or is operating in compliance with antitrust law at § 680.21(b)(3).

Although NMFS has included this precautionary advice in the preamble and the final rule, NMFS declines to include regulatory requirements conditioning the allocation of IFQ to a non-FCMA cooperative on the submission of a business review letter request to DOJ in the final rule as the commenters suggest. NMFS has determined that such regulations would impose unnecessary administrative burdens on the public, NMFS, and the DOJ.

Comment 85: The provision at § 680.21(b)(3) prohibits PQS and IPQ holders and their affiliates to join crab harvesting cooperatives. This limits the ability of vertically integrated harvesters to achieve harvest coordination efficiencies.

Response: NMFS agrees, and for the reasons described in the response to comment 84, has removed this prohibition in the final rule.

Comment 86: The prohibition at § 680.21(f)(4) on crab harvesting cooperative members holding or transferring PQS and IPQ is likely to limit the achievement of efficiencies in the fisheries for a substantial number of vertically integrated share holders. This provision is unnecessary, if crab harvesting cooperatives are not required to be FCMA cooperatives. Remove the prohibition on crab harvesting cooperative members holding or acquiring IPQ and PQS.

Response: NMFS agrees, and for the reasons described in the response to comment 84, has removed this prohibition from the final rule.

Comment 87: In the proposed rule, at § 680.21(f)(4), all non-affiliated cooperatives must be FCMA cooperatives and members may not hold or acquire IPQ. The reason for this is that the harvester Arbitration Organization and a collective bargaining cooperative is an FCMA cooperative and may be exposed to antitrust violation if this provision is removed.

Response: NMFS agrees that members of FCMA cooperatives may not hold or acquire PQS or IPQ and that only FCMA cooperatives can participate in collective negotiation. However, NMFS has removed the requirement that crab harvesting cooperatives under § 680.21 must be formed in accordance with the FCMA. See response to comment 84.

Comment 88: FCMA cooperatives are allowed under cooperative law to vertically integrate by collectively owning a processor(s). Yet, the proposed rule in § 680.21(g)(1) disallows this activity. Furthermore, the Council clearly intended for harvesters to individually or collectively direct-market Class B IFQ, if they so desired. Doing so under the proposed rule, however, would render the harvesters processor-affiliated and deny them all program benefits, including collective price bargaining. This oversight needs to be corrected.

Response: Under the final rule, crab harvesting cooperatives can direct-market crab caught with Class B IFQ. NMFS removed the limitation on processing Class B IFQ at § 680.21(b)(3) in the final rule with the removal of the requirement that all crab harvesting cooperatives be formed under the FCMA. See response to comment 84. PQS and IPQ are not required for the processing of crab caught with Class B IFQ. However, the final rule still contains the restriction on crab harvesting cooperatives owning PQS, IPQ, and QS. This prohibition is necessary to maintain the regulatory distinctions between IFQ held by entities that are not crab harvesting cooperative and IFQ held by crab harvesting cooperatives, and to simplify the administration of the Program. If the regulations allowed crab harvesting cooperatives to hold QS, PQS or IPQ, then the crab harvesting cooperatives would function like all other business entities under the Program. Therefore, crab harvesting cooperatives would no longer function as a crab harvesting cooperative, and not be exempt from the vessel use caps, which is contrary to the intent of the Council motion. Additionally, the Council did not establish QS, PQS, or IPQ ownership caps for crab harvesting cooperatives.

NMFS declines to respond to the comment concerning the legality of vertical integration by FCMA cooperatives as that subject is outside of NMFS' area of expertise.

Comment 89: The agency discussion in the preamble to the proposed rule (on page 63226 and 63227) sets the appropriate precautionary standard relative to antitrust constraints on cooperative membership relative to binding arbitration and limiting participation in FCMA cooperatives.

However, allowing the formation of a separate type of non-FCMA cooperative for the sole purpose of coordinating harvest arrangements and taking advantage of the exemption from leasing restrictions should be provided to processor-affiliated QS holders. This revision should require anyone forming or participating in such a cooperative to submit a request to the DOJ Anti-trust division for a Business Review Letter. Any change in membership of such a cooperative should require submitting a request for a new Business Review Letter.

If the agency allows for these non-FCMA cooperative for affiliate QS holders, the definition section should be updated to create clear definitions of FCMA cooperatives and non-FCMA cooperatives. The section on Binding Arbitration should be updated so that all the current generic references to ''cooperative'' are replaced with the term ''FCMA cooperatives.'' The revisions of the proposed regulations should make it absolutely clear that non-FCMA cooperatives would not be provided any of the shelter from antitrust constraints embodied in the FCMA.

Additionally, non-FCMA cooperatives should not receive any Class B IFQ allocations.

Response: For the reasons discussed in response to comment 84, NMFS agrees that QS holders affiliated with processors should be permitted to join non-FCMA cooperatives and has changed the regulations accordingly. Additionally, NMFS has added definitions at § 680.2 for crab harvesting cooperatives and FCMA cooperatives. NMFS also agrees that the Arbitration System regulations at § 680.20 need to make it clear that, for the Arbitration System, cooperatives that wish to negotiate collectively must be formed

under the FCMA, and NMFS has changed the regulations to reflect this.

NMFS has included a sentence in the final rule at § 680.21 that members of crab harvesting cooperatives that are not FCMA cooperatives should consult counsel before commencing any activity if the members are uncertain about the legality under the antitrust laws of the crab harvesting cooperative's proposed conduct. NMFS also included a statement, in the final rule at § 680.21(b)(3), that issuance by NMFS of a crab harvesting cooperative IFQ permit to a crab harvesting cooperative is not a determination that the crab harvesting cooperative is formed or is operating in compliance with antitrust law. Although NMFS has included these statements in the final rule, NMFS declines to include regulations requiring members of crab harvesting cooperatives to request a business review letter from DOJ. NMFS has determined that such regulations would impose unnecessary administrative burdens on the public, NMFS, and DOJ.

Crab harvesting cooperatives with affiliated members will receive Class A and Class B IFQ that is converted for use in the crab harvesting cooperative according to the provisions set forth at § 680.40(h)(3). These provisions would apply to the IFQ that would be issued to the members of the crab harvesting cooperative if they were receiving the IFQ directly. As an example, if a crab harvesting cooperative had 5 members, all of whom were affiliated, or held IPQ, and 50 percent of their IFQ would be issued as Class A IFQ only, the amount of Class A IFQ that would be issued for use by the crab harvesting cooperative would be in the same proportion—50 percent of the IFQ issued to the cooperative would be issued as Class A IFQ only. The remaining IFQ issued to the cooperative would be issued as both Class A and Class B IFQ.

Comment 90: The proposed rule at § 680.21(g) allows a crab harvesting cooperative to freely engage in intercooperative transfers without regard to individual use caps. The motion intended intercooperative transfers to be conducted through members to allow the application of use caps. Once IFQ are inside a crab harvesting cooperative, any individual or vessel caps do not apply to the movement of those IFQ within the cooperative. In the absence of a requirement that intercooperative transfers be accounted for by individuals in a cooperative for purposes of applying use caps, the program is without any effective use caps. The final rule should require cooperatives to conduct intercooperative transfers through members, as described in the Council motion. The provisions at § 680.41(h) should require designation of the member(s) of the cooperatives that are engaged in the transaction for purposes of applying use caps to the shares a person may bring to a cooperative. In the absence of this limitation, persons could join a cooperative and acquire shares in excess of the cap, making individual use caps ineffective.

Response: NMFS agrees that individual use caps should apply to intercooperative transfers, as required by Amendment 18. In the final rule, intercooperative transfers were moved from § 680.41(h) to § 680.21(f). The final rule at § 680.21(f) requires, on the application for intercooperative transfer, designation of the members of the crab harvesting cooperatives that are engaged in the transaction for purposes of applying the use caps of the members to the cooperative IFQ that is being transferred between the crab harvesting cooperatives.

Comment 91: The application of a ownership cap to intercooperative transfers at § 680.21(f) actually has the potential to disadvantage cooperative members and minimizes the potential efficiencies, in comparison to individual IFQ harvesters. The Council motion does not appear to effectively limit the IFQ that cooperative members could lease, in addition to the individual membership ownership caps. A lease is the use of an annual allocation that is generated in association with QS. In this circumstance it is not clear that it necessarily involves the possession of the QS which would trigger its application. Five unique QS holders, each fishing their own vessel, have the opportunity to collectively harvest twice the ownership/use cap as a cooperative association of the same number of individuals. This issue is important and deserves to be addressed in light of the objective to promote cooperative membership, minimize management complexity, and promote efficiencies in the long term.

Response: Amendment 18 does limit the amount of IFQ that crab harvesting cooperative members can lease through the application of the use caps to intercooperative transfers of IFQ. Use caps apply to both the QS and the IFQ a person holds. Amendment 18 clearly states that transfers (*i.e.* leases) of IFQ between crab harvesting cooperatives will be undertaken by the members individually, subject to use caps. Requiring an intercooperative transfer to occur through members is necessary for the application of the use caps. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions as specified in Amendment 18. Note that although Amendment 18 uses the term 'ownership caps', in the final rule NMFS uses the term 'use caps' because persons do not own QS or IFQ.

Comment 92: The term ''crab harvesting cooperative,'' which is used frequently throughout the rule, is not defined at either § 679.2 or § 680.2. The final rule should include definitions for ''FCMA crab harvesting cooperatives'' (made up of those who are eligible to receive ''Arbitration IFQ'') and ''non-FMCA crab harvesting cooperatives'' which would be limited in scope. Section 680.21(c)(2) should also be revised in a manner that is consistent with this approach.

Response: At § 680.2, NMFS has added a definition for crab harvesting cooperative, for the purposes of 50 CFR part 680, to mean a group of crab QS holders who have chosen to form a crab harvesting cooperative, under the requirements of § 680.21, in order to combine and collectively harvest their crab IFQ through a crab harvesting cooperative IFQ permit issued by NMFS. NMFS has also added a definition for FCMA cooperative, for the purposes of 50 CFR 680, to mean a cooperative formed in accordance with the Fishermen's Collective Marketing Act of 1934 (15 U.S.C. 521). Additionally, at § 680.20, NMFS has clarified that only FCMA cooperatives can participate in the Arbitration System. See NMFS' response to comment 84 as to why NMFS removed the proposed requirement that crab harvesting cooperatives be FCMA cooperatives.

Comment 93: Because of the potential for antitrust violations, two types of crab cooperatives should be allowed to be formed: (1) Unaffilitated cooperatives (FCMA type) that can hold, fish and trade Class A and Class B IFQ and CVC and CPC IFQ and enter into binding arbitration based on their best financial interest and efficiency; and (2) A non-FCMA ''operational cooperative'' for purposes of economic efficiency of processor affiliates, that allows processor affiliates to form cooperatives for purposes of Class A IFQ fishing but prohibits participation in arbitration and the fishing of Class B IFQ and CVC and CPC IFQ due to antitrust violation potential.

Response: The final rule distinguishes between FCMA cooperatives for the Arbitration System at § 680.20 and crab harvesting cooperatives at § 680.21. However, NMFS disagrees that crab harvesting cooperatives with affiliated members should be prohibited from

fishing Class B IFQ and CVC and CPC IFQ. Under the final rule, NMFS will issue Class B IFQ based on the amount of Class B IFQ that would be issued to each member individually, as discussed under comment 89.

Comment 94: The proposed rule at § 680.21 prohibits CDQ groups that share ownership of crab vessels with processors from being able to achieve the efficiencies of participating in crab harvesting cooperatives. Also, the proposed rule at § 680.40 prohibits CDQ groups that are affiliated with processors from receiving Class B IFQ. These prohibitions will severely affect CDQ groups who have made investments in crab harvesting vessels jointly with holders of PQS. These regulations will hamper the ability of CDQ groups to further integrate into the processing of king and Tanner crab and to consider processing crab for markets not yet utilized. CDQ groups could not be expected to purchase QS under these regulations that deny them the ability to join a crab harvesting cooperative and the ability to receive unrestricted Class B IFQ.

Response: NMFS agrees and has changed the regulations at § 680.21 to allow CDQ groups that are affiliated with processors to join crab harvesting cooperatives. See response to comment 84. Additionally, NMFS has changed the regulations in the final rule at § 680.40(h) to allocate Class B IFQ to persons that hold PQS/IPQ or are affiliated with PQS/IPQ holders. See response to comment 25.

Comment 95: Non-FCMA cooperatives are disallowed under § 680.21. If the final rule were to allow processor-affiliated vessels to join a non-FCMA cooperative that could participate in Program benefits, the four unique entity rule would be problematic. A single processor that owns multiple vessels could not form a cooperative because it could not pass the four-independent entity rule stipulated by the Council and by the proposed rule. Note however, the proposed rule applies to FCMA and are silent on Non-FCMA. If the four-entity rule applied to Non-FCMA cooperatives and if Non-FCMA cooperatives were allowed, then processors could cooperate and aggregate processor-vessels across multiple processors. Operational efficiencies intended by the Council require coordinated decision making among harvesters and processors with mutual interest. These efficiencies may be achieved only if Non-FCMA cooperatives are allowed.

Response: See Response to comment 84. NMFS has revised the regulations regarding FCMA cooperative formation and provided additional advice for reducing potential antitrust risk. Non-FCMA crab harvesting cooperatives are permitted under this final rule.

NMFS proposed that any QS holder could be considered a ''unique entity'' for the purposes of crab harvesting cooperative formation. However, whether the QS holder is a ''unique entity'' for purposes of meeting the minimum requirement of four unique entities for crab harvesting cooperative membership depends on whether the QS holder is ''affiliated'' with another entity seeking membership in the same crab harvesting cooperative. NMFS has revised the definition of ''affiliation'' at § 680.2 to better accommodate the needs of the affected public. However, Amendment 18 does not distinguish between FCMA and non-FCMA cooperatives regarding affiliation and the four unique entity rule. Therefore, the definition of affiliation and the four unique entity rule apply equally to FCMA and non-FCMA cooperatives under this final rule.

Comment 96: The proposed regulations at § 680.21(d)(4) provide that IFQ resulting from CVC and CPC QS would be converted to standard IFQ, if the holder joins a crab harvesting cooperative, effectively removing any owner on board requirements for CVC or CPC QS. The motion intended the C share pool to benefit persons actively on board vessels in the fisheries. The final rule should not convert CVC and CPC IFQ to CVO and CPO IFQ when held by a crab harvesting cooperative and should require that the owner of the CVC or CPC IFQ be on board when the crab harvesting cooperative is fishing its CVC or CPC IFQ. Additionally, the regulations should clarify that CVC IFQ issued to a crab harvesting cooperative are not subject to the Class A/Class B IFQ split during the first three years of the program.

Response: Amendment 18 states that holders of CVC or CPC QS or qualified lease recipients are required to be on board the vessel used to harvest CVC or CPC IFQ and that CVC and CPC QS holders are eligible to join crab harvesting cooperatives. Amendment 18 does not provide any exemption to the owner on board requirements for CVC or CPC QS holders if the QS holder joins a crab harvesting cooperative. In developing the proposed rule, NMFS, for reasons provided in the preamble of the proposed rule (69 FR 63200, 63228, October 29, 2004), emphasized the Council's intent for crab harvesting cooperatives to maximize efficiencies and benefits through consolidation and collective management of the members' QS holdings by proposing to convert CVC and CPC QS to CVO and CPO IFQ when held by a crab harvesting cooperative. However, comments received from the Council as well as comments received from the general public indicate that NMFS inappropriately allowed the rationale for maximizing crab harvesting cooperative efficiencies to override the legislated owner on board requirements for holders of CVC and CPC QS or qualified lease recipients. NMFS recognizes that the owner on board requirement is fundamental to supporting active participation in the crab fisheries and was intended to extend to CVC and CPC QS holders if the QS holder joins a cooperative. Therefore, NMFS has removed the requirement that all CVC and CPC QS held by the members of a crab harvesting cooperative be converted to CVO and CPO IFQ. Additionally, the final rule at § 680.42(c)(5) clearly provides that all CVC or CPC QS holders must be on board the vessel at all times when harvesting his or her CVC or CPC IFQ.

NMFS agrees that CVC QS is not subject to the Class A/Class B IFQ split during the first three years of the program. The final regulations clearly indicate at § 680.40(b)(1)(ii) and (h)(6)(ii) that CVC QS and the resulting IFQ will not be subject to the Class A/Class B IFQ split until July 1, 2008. Therefore, any CVC QS committed to a cooperative will not be subject to the Class A/Class B IFQ split until July 1, 2008.

Comment 97: The Program pushes all individual harvesters to join cooperatives by providing advantages to cooperative members over individual harvesters, such as in arbitration, price formation, overages, and QS transfer. Harvesters will be forced to join a cooperative in 5 years. While cooperatives will be easier for NMFS to manage, this is not sufficient reason to dictate the structure of how an individual harvester does business. Financial advantages will encourage most harvesters to join crab harvesting cooperatives. It should be a harvester's decision, based on what is best for the harvester.

Response: Amendment 18 specifically states that, for IFQ holders that are not crab harvesting cooperative members, leasing would be allowed for the first 5 years of the Program. NMFS does not possess any discretion to vary the implementation of the 5-year leasing provision at this time. Any change to the 5-year leasing provision requires an amendment to the Program and should be addressed through the Council process.

NMFS agrees that management of a few, well-organized cooperatives will be easier than management of multiple individual harvesters. Although the Council and NMFS designed the Program to encourage crab harvesting cooperative membership, membership in a crab harvesting cooperative is entirely voluntary and remains the decision of the individual harvester. Each harvester has the choice whether to join a crab harvesting cooperative based solely on their individual financial and operational needs.

Comment 98: It is important that a skipper or crew member's Class B IFQ do not automatically become crab harvesting cooperative shares by virtue of his or her vessel's participation in that crab harvesting cooperative. The decision whether to transfer his or her Class B IFQ to an eligible fisherman on a vessel in a different crab harvesting cooperative or on a vessel not participating in a crab harvesting cooperative must remain open to the skipper or crew member.

Response: NMFS agrees. However, during the first three years of the Program, CVC QS will not be subject to the Class A/Class B IFQ split (see response to comment 96). During the first three years of the Program, CVC QS holders will not be able to withhold their Class B IFQ from conversion to Cooperative IFQ when they join a cooperative because no Class B IFQ will exist for CVC QS holders. Therefore, if a CVC QS holder wishes to join a cooperative in any crab fishery during the first three years of the Program, he or she must commit all of his or her IFQ for that crab fishery to that cooperative.

Nonetheless, NMFS believes that allowing CVC QS holders to withhold their Class B IFQ from submission to a crab harvesting cooperative will allow for greater flexibility in fishing those shares and provides the greatest advantage to skippers and crew. Under this rule, the regulations have been clarified at § 680.21(a)(1)(iii)(B) to permit CVC QS holders to withhold their Class B IFQ from submission to a crab harvesting cooperative for use as individual IFQ when joining a crab harvesting cooperative after the third year of the Program.

Comment 99: The application of a 10 percent criterion to crab harvesting cooperative membership is unreasonably restrictive, and as a result, the proposed rule runs counter to the key policy objectives of the rationalization program: improved conservation and safety, and increased economic efficiency. The Council could not have intended this result, and there is a strong argument to be made that the antitrust laws do not require such restrictive criteria, and in fact, that the 10 percent criterion, as applied in the manner provided in the proposed rule, would inhibit, not protect, competition.

This overly restrictive criterion for affiliation unduly limits the formation of crab harvesting cooperatives in the following ways: The effect of the 10 percent criterion will be to prohibit harvesters from participation in crab harvesting cooperatives, if they enter into agreements to invest in PQS; Holders of Class B IFQ who engage in custom processing of that IFQ with their own company, or are affiliated with an entity doing custom processing, including live crab sales, would be prohibited from participation in crab harvesting cooperatives; Holders of harvester QS who invest in any amount of PQS will be restricted to the issuance of only Class A IFQ, and forego market leverage opportunities of Class B IFQ; Under the 10 percent criterion, processors will realistically only be able to transfer or sell PQS to other processors. This will encourage consolidation of PQS among the existing processors and eliminate opportunities for harvester investment in PQS.

The Proposed Rule should allow for affiliated QS holders to participate in non-FCMA ''operational cooperatives'' for purposes of economic efficiency, but affiliated QS holders should be prohibited from participation in price formation negotiations.

Response: Amendment 18, clearly establishes that four unique entities may join to form a crab harvesting cooperative with the requirement that ''entities must be less than 10 percent common ownership without common control.'' The decision to measure affiliation as a linkage between two or more entities with a 10 percent or greater common ownership interest is discussed in NMFS's response to comment 25. As discussed in the response to comment 84, NMFS has modified the final regulations to allow persons affiliated with PQS and IPQ holders to join crab harvesting cooperatives, provided that they are ''unique entities'' according to the standard set forth in Amendment 18 and under this rule.

The unique entity rule applies to the formation of crab harvesting cooperatives. For purposes of collective negotiation under the Arbitration System, only cooperatives formed under the FCMA may collectively negotiate. The Arbitration System does not permit ''affiliated'' IFQ holders to participate collectively in an FCMA cooperative for purposes of collective negotiation. Therefore, a crab harvesting cooperative of IFQ holders without ''affiliations'' to PQS/IPQ holders that forms under the requirements of the FCMA could collectively negotiate, but a crab harvesting cooperative with affiliated IFQ holders could not collectively negotiate for purposes of the Binding Arbitration procedure under the Arbitration System.

Comment 100: Waiving the owner on board provision for C shares within a crab harvesting cooperative as outlined in the proposed rule at § 680.21(d)(4) greatly facilitates the use of those shares in a crab harvesting cooperative as long as the definition of ''active participant'' is attached to all CVC and CPC QS initially issued and subsequently transferred. ''Active participant'' means recent participation in a rationalized crab fishery in the 365 days prior to the use of the CVC or CPC IFQ. Class C shares should be kept ''on the vessel'' so that they not get locked up ''on shore,'' which would happen if the owner on board requirement were dropped in a crab harvesting cooperative without requiring the C share holder to be an active participant in the fisheries. Dropping the owner on board requirement for C shares when in a crab harvesting cooperative greatly improves flexibility for the C share holder, especially in the case of small distant fisheries like St. Matthew blue king crab where, in the case of a small TAC, only a few boats may participate and it may be impossible to accommodate all the C share IFQ holders. Dropping the owner on board requirement in a crab harvesting cooperative will also reduce the burden put on the agency for tracking and managing CVC and CPC IFQ as a separate and distinct type of IFQ in the crab harvesting cooperative. If the active participant requirement were made the sole requirement for holders of CVC or CPC QS in a crab harvesting cooperative, then the CVC or CPC QS holder would only have to provide proof at the time of application for that season's IFQ that they had made a landing in a rationalized crab fishery in the past 365 days, reducing the workload on NMFS management and enforcement during the fishery itself.

Response: See response to comment 96. Amendment 18 does not include any exemptions from the owner on board requirement. NMFS agrees with the Council that CVC and CPC QS used in a crab harvesting cooperative is subject to owner on board requirements to be consistent with Amendment 18. NMFS also recognizes that the Council considered CVC and CPC QS owner on board requirements fundamental to supporting active participation in the crab fisheries. The final rule clearly

provides, at § 680.42(c)(5), that all CVC or CPC QS holders must be on board the vessel at all times when harvesting his or her CVC or CPC IFQ.

Nonetheless, NMFS does not agree that the proposed ''active participant'' designation alone would sufficiently prevent CVC and CPC QS from being fished in a crab harvesting cooperative by absentee owners. Active participation in the BSAI crab fisheries is demonstrated by a landing in a crab fishery in the last 365 days. Documentation of ''active participation'' includes an ADF&G fish ticket, an affidavit from the vessel owner, or other verifiable documentation. This would allow for an individual to be on board the vessel for a single landing in any given year and remain an absentee owner for the remainder of the year.

Comment 101: Because permitting affiliated crab harvesting cooperatives to hold Class B IFQ issued on the basis of membership in the cooperative by non-affiliated harvesters could result in IPQ holder control over Class B IFQ, non-FCMA crab harvesting cooperatives with affiliated members should not be permitted to hold Class B IFQ. Even if a non-FCMA crab harvesting cooperative limits its activity to harvesting allocation, that harvesting allocation function could permit a non-affiliated harvester to assign his or her Class B IFQ to an affiliated harvester, in direct contravention of the Council motion and the fundamental purpose of the Class A/Class B IFQ distinction.

Response: Amendment 18 does not preclude the ability of persons affiliated with PQS or IPQ holders from holding Class B IFQ. Prohibiting the issuance of Class B IFQ to a crab harvesting cooperative if it has members who are affiliated with an IPQ or PQS holder is not appropriate given the lack of restriction on affiliated entities that do not join crab harvesting cooperatives. Class B IFQ is not issued to individual members in a cooperative, but rather is issued to the crab harvesting cooperative as a single entity, and the specific use of Class B IFQ by members of a crab harvesting cooperative is determined by internal contractual agreements among members. If a crab harvesting cooperative operates in a manner that results in a violation of antitrust laws, DOJ has the ability to investigate any claims.

The goal of the Class B IFQ allocation is to provide additional negotiating leverage for harvesters when it comes to price negotiation with IPQ holders for their Class A IFQ. Joining a crab harvesting cooperative is a voluntary arrangement and parties to that arrangement should be aware of the affiliations of the other members of the cooperative. If a person does not want to join a crab harvesting cooperative with affiliated IFQ holders out of concerns about potential use of Class B IFQ by the crab harvesting cooperative, that person does not have to join the crab harvesting cooperative, or could establish private contractual arrangements with other crab harvesting cooperative members concerning the use of the person's Class B IFQ. Allowing affiliated IFQ holders to join crab harvesting cooperatives is not in direct contravention to Amendment 18.

Comment 102: Why are CPs exempt from the processor restrictions on cooperative formation and able to fully benefit from rationalization? The answer seems to be that the proposed rule only considered antitrust risk at the point of ex-vessel pricing. Catcher processors are processors and in the AI golden king crab market, they have sufficiently large market share in which collusive marketing behavior could adversely affect the consumer. However, CPs also buy crab from catcher vessels. So, the fact that CPs can join FCMA cooperatives is a double standard. Shoreside processors must pass the standard of zero risk of potential collusion in the ex-vessel market or the first-wholesale market, while at-sea, vertically integrated CPs must pass a lesser standard of no likely price collusion at first-wholesale. Catcher processors need two limited antitrust exemptions: (1) Downstream wholesale pricing, especially in WAI golden crab, where CPs process a majority of the harvest and could adversely impact consumers, and (2) ex-vessel price formation with ''over-the-side'' purchases. The regulations should be consistent in their treatment of all processors, unless Amendment 18 explicitly differentiates between on-shore processors and CPs.

Response: The decision to exclude PQS and IPQ holders from crab harvesting cooperatives but permit CPs to join crab harvesting cooperatives stemmed from the proposed requirement that crab harvesting cooperatives be FCMA cooperatives. As stated in the preamble to the proposed rule, NMFS proposed to prohibit PQS and IPQ holders (or those affiliated with persons that hold PSQ or IPQ) from membership in crab harvesting cooperatives because, at the time of the issuance of the proposed rule, NMFS determined that, while there was some legal uncertainty, there was a significant risk that a crab harvesting cooperative with such members would fail to meet the requirements for FCMA cooperatives and thereby lose the antitrust immunity provided by the FCMA. The proposed rule did not prohibit CPs from membership in FCMA crab harvesting cooperatives because the risk of inconsistency with the FCMA was less certain. NMFS has revised the regulations regarding crab harvesting cooperative formation by removing the FCMA requirement for crab harvesting cooperatives and permitting affiliated harvesters to join crab harvesting cooperatives, and has provided additional advice for reducing potential antitrust risk (*see* response to comment 84). These changes should eliminate any perceived disparity between the requirements imposed on CPs in relation to those imposed on shoreside processors regarding antitrust risk and participation in crab harvesting cooperatives.

NMFS does not have the statutory authority to impose the limited antitrust exemptions contained in the comment. Furthermore, section 313(j)(6) of the Magnuson-Stevens Act states that nothing in the Magnuson-Stevens Act constitutes either an express or implied waiver of the antitrust laws of the United States.

Comment 103: The proposed rule at § 680.21(b)(4) and (5) provides for ''all or nothing'' membership by a harvester in a single cooperative, thus prohibiting membership in multiple cooperatives in different fisheries. Restricting membership to only one cooperative will limit the ability of participants to achieve efficiencies. Additionally, benefits from leasing across cooperatives are not likely to be as large as membership in multiple cooperatives. This provision should be replaced with a provision that allows one cooperative per fishery or one cooperative per fishery and region to allow harvesters to more efficiently and safely harvest their IFQ.

Response: After extensive public comment and further consideration, NMFS has determined that QS holders may participate in more than one crab harvesting cooperative. NMFS initially determined that because the Program would allow unrestricted leasing between crab harvesting cooperatives, each cooperative would be free to focus on harvesting IFQ for the fisheries of its choice and through leasing would achieve the same benefits as allowing QS holders to join multiple cooperatives. NMFS now understands that QS holders would not be able to achieve the same level of efficiency by leasing as they would through joining multiple crab harvesting cooperatives. Additionally, NMFS initially determined that allowing QS holders to join multiple cooperatives would result

in an administratively unmanageable system. NMFS has since developed a method for simplifying the administration of multiple crab harvesting cooperatives.

NMFS also was concerned that if membership were allowed in more than one crab harvesting cooperative it would be easy for QS holders to allocate a nominal amount of IFQ to a crab harvesting cooperative and effectively result in single member crab harvesting cooperatives that undermine the Council's intent for a minimum membership of four entities. In the final rule, NMFS is requiring a QS holder to commit all of his or her QS holdings for a particular fishery for conversion to cooperative IFQ upon joining a cooperative in that fishery. NMFS has concluded that this requirement will deter the nominal donation of IFQ and subsequent formation of single member crab harvesting cooperatives.

Furthermore, NMFS was concerned that bycatch may increase if single-species crab harvesting cooperatives were formed because the crab harvesting cooperative would have to discard all legal crab species for which the cooperative did not possess IFQ. NMFS remains concerned about potential bycatch, but has concluded that diverse QS ownership by members in crab harvesting cooperatives and the ability to lease between crab harvesting cooperatives will help reduce potential bycatch concerns. Finally, NMFS was concerned that crab harvesting cooperative management would be diluted by members who have joined multiple cooperatives resulting in reduced effectiveness managing the harvesting of the cooperative's IFQ. By limiting crab harvesting cooperative membership by fishery, NMFS has concluded that it has sufficiently reduced the potential for membership dilution and has been convinced by public comment that multiple cooperatives can be effectively managed by their members.

Therefore, NMFS has been persuaded by public comment that the reasons articulated in the proposed rule preamble as to why QS holders may only join one crab harvesting cooperative are no longer valid. NMFS has revised the final rule at § 680.21(a)(1)(iii) to permit crab harvesting cooperative membership by a QS holder to one crab harvesting cooperative per fishery. A minimum standard of one crab harvesting cooperative per fishery is necessary to balance NMFS'' desire to reduce administrative burden while continuing to allow participants to realize the efficiency benefits of cooperatives. However, NMFS continues to require that all of a QS holder's IFQ for any fishery must be committed to the crab harvesting cooperative they wish to join. For instance, if a QS holder holds 10 units of IFQ in the Bristol Bay Red (BBR) king crab fishery and 20 units of IFQ in the Western Aleutian golden (WAG) king crab fishery and wishes to join a crab harvesting cooperative in the WAG fishery, he or she must commit all 20 units of WAG IFQ to the WAG crab harvesting cooperative he or she chooses to join. The QS holder may choose to fish his or her BBR IFQ independently or may commit all 10 units of BBR IFQ to a cooperative in the BBR fishery. Therefore, NMFS revised the final rule at § 680.21(a)(1)(iii)(B) to permit QS holders to join one crab harvesting cooperative per fishery, but it requires QS holders to commit all their IFQ to the crab harvesting cooperative in the fishery that they wish to join.

NMFS rejected further restrictions on crab harvesting cooperative membership by region because complicated crab harvesting cooperative relationships based on regional differences may unnecessarily hinder the efficiencies that NMFS is attempting to achieve with multiple crab harvesting cooperatives. Individual crab harvesting cooperatives must ensure compliance with the appropriate regional delivery requirements of crab harvesting cooperative IFQ.

Comment 104: The regulations should allow QS holders to be members, simultaneously, of different cooperatives in different fisheries or in the same fisheries in order to maximize economic efficiency and achieve other benefits.

Response: See response to comment 103. NMFS has determined that one cooperative per fishery will achieve a balance between minimizing administrative burden while continuing to allow participants to realize the efficiency benefits of crab harvesting cooperatives. NMFS also has determined that one crab harvesting cooperative per fishery is consistent with statutory and Council intent. However, NMFS has determined that membership in multiple crab harvesting cooperatives within a single fishery would result in an administrative burden that outweighs any additional corresponding efficiency benefits to the industry. NMFS has revised the regulations in the final rule to limit QS holders to membership in one crab harvesting cooperative per fishery.

Comment 105: The proposed rule at § 680.21(e)(3) provides that all members of a cooperative are liable for violations of any individual member. What kinds of violations are swept up in this? The Council's intent was to hold all members of the cooperative accountable for violations like exceeding caps, bycatch, etc., not, for example, a personal violation, like a crewmember retaining undersized crab for personal consumption. Nor did the Council intend that one individual's failure to comply with the economic and social data requirements be applied to all members. This accountability needs to be clarified and brought into compliance with Council intent.

Response: NMFS has determined that the provision for crab harvesting cooperative joint and several liability as presented in the proposed rule is consistent with the Magnuson-Stevens Act and Council intent. NMFS was directed by statute that monitoring and enforcement of harvest allocations will be at the crab harvesting cooperative level and that crab harvesting cooperative members will be jointly and severally liable for the actions of the crab harvesting cooperative. This means that any violation by any member of a crab harvesting cooperative will be subject to joint and several liability. Joint and several liability means each liable party is individually responsible for the entire obligation, although the parties may decide among themselves how to apportion a particular penalty.

For instance, if NMFS finds an individual cooperative harvester retaining undersized crab, depending on the facts of the case, the harvester and the crab harvesting cooperative may both be the subjects of an enforcement action.

However, payment of fees and submission of an EDR are application requirements that must be completed before a PQS or QS holder may receive IPQ or IFQ. Any QS holder must first receive his or her IFQ before he or she can dedicate that IFQ to a crab harvesting cooperative. A complete application includes the submission of an EDR and payment of any fees. Applications for IFQ must also be timely to be considered by NMFS. If an individual does not receive his or her IFQ because they failed to submit a complete and timely application, no IFQ will exist for that person to convert into crab harvesting cooperative IFQ. Submission of a complete and timely application is not a matter of joint and several liability, but is a matter of individual responsibility and permit administration.

Comment 106: The proposed rule, at § 680.21(b)(2), does not apply a standard for a crab harvesting cooperative to reject any QS holder. Because a QS holder loses the benefits of QS

consolidation, leasing after five years, and elimination of the vessel cap, a change needs to be made to the regulations so that private persons may not deny a government benefit to a QS holder. One possibility would be a default cooperative, that any QS holder could join.

Response: Amendment 18 clearly directs that membership in crab harvesting cooperatives is voluntary. The term ''voluntary'' is generally defined as unconstrained by interference or not impelled by outside influence. Consistent with this definition, NMFS did not impose any regulations for membership requirements regarding crab harvesting cooperatives. NMFS took a minimalist approach and determined that no QS holder is required to join a crab harvesting cooperative to receive or harvest IFQ and no crab harvesting cooperative is required to accept a member as a QS holder that the crab harvesting cooperative does not wish to admit. Therefore, the regulations do not address any requirements for acceptance or denial regarding crab harvesting cooperative membership.

If a crab harvesting cooperative denies membership to a person, it is not a denial of a government benefit, but is simply a denial of membership to that person by that crab harvesting cooperative. The government benefit of participation in a crab harvesting cooperative continues to be available to any person regardless of whether the person joins or is rejected from a crab harvesting cooperative. NMFS anticipates that many crab harvesting cooperatives will exist for each fishery. A person rejected by one crab harvesting cooperative could continue to solicit other crab harvesting cooperatives for admission. Given the voluntary nature of crab harvesting cooperatives and the large number of crab harvesting cooperatives that NMFS anticipates will exist for each fishery under the Program, NMFS has determined that the creation of a NMFS sanctioned ''default crab harvesting cooperative'' is unnecessary.

Comment 107: The regulations require a minimum of four unique QS-holding entities for the formation of a crab harvesting cooperative, but do not clearly state that C share holders are considered ''unique entities'' for the purposes of crab harvesting cooperative formation. Each QS holding individual should be considered a unique entity, whether or not that individual holds some interest in a commonly held corporation. The final rule should clarify that C share holders are considered ''unique entities'' for the purposes of crab harvesting cooperative formation.

Response: NMFS proposed that any QS holder, including CVC and CPC QS holders, could be considered ''unique entities'' for the purposes of crab harvesting cooperative formation and has continued this provision in the final rule. However, whether a CVC or CPC QS holder is a ''unique entity'' for purposes of meeting the minimum requirement of four unique entities for crab harvesting cooperative membership depends on whether the CVC or CPC QS holder is ''affiliated'' with another entity seeking membership in the same crab harvesting cooperative. If a CVC or CPC QS holder is ''affiliated'' with another entity seeking membership in the same crab harvesting cooperative, then NMFS will consider the CVC or CPC QS holder and the affiliated entity as representing only one unique entity. Conversely, if a CVC or CPC QS holder is not ''affiliated'' with any other entity seeking membership in the same crab harvesting cooperative, then NMFS will consider the CVC or CPC QS holder as one unique entity. NMFS has revised the definition of ''affiliation'' in section 680.2 to clarify that any individual QS holder, including CVC and CPC QS holders, qualify as unique entities for the purposes of crab harvesting cooperative formation provided they are not considered ''affiliated.''

Community Protection Measures

Comment 108: NMFS is giving away the fisheries resources forever to corporate interests outside of the Aleutians, including Japanese corporate interests with lobbying ties to Washington, DC. This amounts to economic genocide and strips local residents of economic opportunity that would provide them with the ability to continue to live in the region.

Response: Allocating QS to fishery participants is a provision of Amendment 18. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions as specified in Amendment 18. Additionally, the Program contains provisions to allocate the crab resources to Alaskan communities, including communities in the Aleutian Islands. The CDQ allocation increased from 7.5 percent to 10 percent of the TAC, and the CDQ crab species are increased to include Eastern Aleutian Islands golden king crab and Western Aleutian Islands red king crab. Adak will be allocated 10 percent of the Western Aleutian Islands golden king crab fishery, and 50 percent of this fishery must be processed in Adak. These provisions provide local residents with economic opportunities in the BSAI crab fishing industry to support their ability to live in the region.

Comment 109: The Council motion outlines the terms that should govern the management of the Adak allocation of WAI brown king crab. No provision is made in the regulations for management of that allocation.

Response: NMFS regulations define the Adak community entity at § 680.2 and provide for the allocation of 10 percent of the TAC of Western Aleutian Islands golden king crab to the Adak community entity at § 680.40(a).

With respect to management or oversight of the use of this allocation by the Adak community entity, Amendment 18 states, in part, a ''set of use procedures, investment policies and procedures, auditing procedures, and a *city or state oversight mechanism* [emphasis added] will be developed. Funds collected under the allocation will be placed in a separate trust until the above procedures and a plan for utilizing the funds for fisheries related purposes are fully developed. Funds will be held in trust for a maximum of 2 years, after which the Council will reassess the allocation for further action * * *. Use CDQ type management and oversight to provide assurance that the Council's goals are met. Continued receipt of the allocation will be contingent upon an implementation review conducted by the *State of Alaska* [emphasis added] to ensure that the benefits derived from the allocation accrue to the community and achieve the goals of the fisheries development plan.''

NMFS interpretation of Amendment 18 is that the State of Alaska is primarily responsible for oversight of the use of the allocation for fisheries related purposes. Therefore, oversight of the use of the allocation by the Adak community entity for ''fisheries related purposes'' is deferred to the State of Alaska under the FMP. The FMP contains the Council's motion about oversight of the Adak allocation to provide specific direction to the State. NMFS will have no direct role in management or oversight of the use of the allocation and NMFS will not direct the State through Federal regulations about how to conduct its oversight responsibilities. The State will implement State regulations that are consistent with the FMP. Any persons believing that the State is acting inconsistently with the FMP may follow the appeal procedures in the FMP or raise the issue with the Council and request regulatory action to further clarify or define the State's oversight role.

In addition, the FMP directs the State to conduct an implementation review for the Council to ensure that the benefits derived from the allocation accrue to the community and achieve the goals of the fisheries development plan. The Council's motion did not specify when this implementation review should be conducted. Therefore, it will be up to the Council and the State to determine an appropriate time for this review to be presented to the Council.

Comment 110: The proposed rule § 680.40(m) and § 680.41(c) and (d) incorrectly revised the rules of the right of first refusal. The motion clearly identifies the terms of the right of first refusal.

Response: NMFS agrees and the final rule has been revised from the proposed rule to remove § 680.40(m) and to reference the civil contract terms for the establishment of ROFR as set forth at section 313(j) of the Magnuson-Stevens Act. A list of contract terms is available from the NMFS Alaska Region Web site at *http://www.fakr.noaa.gov.* This approach ensures consistency with Amendment 18 and is appropriate because NMFS would not monitor or enforce these contract terms. Regulations at § 689.41(c) and (d) have been revised to more closely reflect Council intent regarding the discretion of an ECC to designate an ECC entity and enter into civil contracts for ROFR.

Comment 111: The rationale for having both ECCOs and ECC entities is not clear. The ECCO seems to be the entity that holds shares for a community, while the ECC entity has the right of first refusal. The Council motion contemplates a single entity to serve both of these purposes. In addition, it is unclear that one entity would have the ability to exercise a ROFR, but not be able to take possession of shares on the exercise of that right. In addition, given the administrative burden of the program, it is unclear why the agency would like to oversee additional entities/organizations. The final rule should establish a single entity to hold the right of first refusal and any community shares.

Response: NMFS disagrees that Amendment 18 states that a single entity would serve both the ECCO function for purchase and holding of QS and the ECC entity function of representing a non-CDQ ECC in the exercise of ROFR. Amendment 18 states: ''Ownership and management of harvest and processing shares by community entities in non-CDQ communities [ECCOs] will be subject to rules established by the halibut and sablefish community purchase program.'' This ''program'' refers to the regulations established under Amendment 66 to the FMP for Groundfish of the GOA for the restrictions associated with the designation of an ECCO, including the requirement that these organizations be non-profit. No such restrictions were set forth in Amendment 18 for an ECC entity. While an ECCO could also serve as an ECC entity, an entity designated by an ECC to represent it in the exercise of ROFR may not meet the conditions and criteria for an ECCO. Thus, an ECC that wishes to purchase QS and designate an ECCO for that purpose could also designate the ECCO as its ECC entity for purposes of ROFR, but is not required to do so.

Comment 112: The requirement of a ROFR contract at the time of application at § 680.40(f)(3) and (7) is inconsistent with the Council motion. PQS applicants need to enter the contract only if the ECC entity is designated by a time certain. Instead, applicants for PQS should provide notice to an eligible community that they intend to apply for PQS that could be subject to a ROFR. If the community notifies the agency and the PQS applicant that it has formed an entity (and provides contact information for the entity) the PQS allocation would be made only on completion of the contract establishing the terms of ROFR. If the contract is not executed, the parties could seek remedies in civil court to the extent necessary.

Response: NMFS agrees and has changed the final rule to reflect that the designation of an ECC entity is a choice and not a requirement. Only if such a designation is made within 30 days prior to the ending date of the initial application period for crab PQS (§ 680.41(l)) would an ECC have opportunity to exercise ROFR in the future.

Comment 113: The contract terms for ROFR at § 680.40(m) are not those in the Council motion. A cleaner approach would be to just copy the Council motion, rather than reinterpret it.

Response: NMFS agrees and has removed § 680.40(m) from the final rule and cross referenced section 313(j) of the Magnuson-Stevens Act concerning civil contract terms for ROFR as statute provisions under § 680.40(f)(3). See also response to comment 110.

Comment 114: For purposes of implementing the ROFR at § 680.40(m), ''movement of shares from a first or second class city, if one exists, and borough, if a first or second class city does not exist,'' constitutes ''movement of shares from the community''. Note that this differs from the cooling off period. Clarify provisions that apply to movement of PQS/IPQ from the community.

Response: See response to comment 110. The final rule also has been revised to clarify that the definition of ''community'' for purposes of movement of PQS/IFQ during the cooling off period has been added to the final rule at § 680.42(b)(4) to differentiate these restrictions from the movement of PQS/IFQ for purposes of ROFR after the cooling off period (see response to comment 136 for additional information on the application of community for the cooling off period.)

Comment 115: The provision at § 680.40(m)(2) states that ''any sale must be provided on the same terms'' to the EEC entity. This wording is not a complete description of the right of first refusal, since the ability to exercise the right applies for a limited period and is exercised by performing the terms, not receiving an offer. Use the language from the motion.

Response: NMFS agrees. See response to comment 110.

Comment 116: Since ROFR applies to IPQ, the provision at § 680.40(m)(6) should be broadened to include waivers with respect to IPQ. Since ROFR applies to IPQ, the provision at § 680.40(m)(7) should be broadened to include ROFR with respect to IPQ, under the terms of the motion.

Response: NMFS agrees. See response to comment 110.

Comment 117: It is unclear at § 680.41(c)(3)(i) and (ii) whether the ECCO can hold and transfer PQS. The ECCO should be able to hold and transfer both QS and PQS. Clarify that ECCOs can hold PQS.

Response: NMFS agrees that an ECCO can hold and transfer both QS and PQS. Any person, including an ECCO, may apply to receive and hold PQS or IPQ by transfer. The final rule at § 680.41(c)(1)(i) makes this clear. Restrictions exist, however, on who can purchase QS and special provisions for transfer to and holding of QS by an ECCO must therefore be set forth in regulations.

Comment 118: The provision at § 680.41(c)(3)(i) and (ii) states that each ECC *must* designate an ECCO. The rationale for this absolute requirement is unclear. Communities have the option of designating an ECC entity, but would waive the ROFR and not be permitted to use the community purchase privilege, if they chose not to. ''Must'' should be changed to ''may''.

Response: The commenter is confusing ECCO provisions for the purchase of QS with ECC entity provisions for purposes of exercising ROFR. NMFS agrees that a non CDQ

ECC is not required to designate either an ECCO for purposes of purchasing and holding PSQ, IPQ or QS or an ECC entity to exercise ROFR. The final rule at § 680.41(l)(2)(ii) provides a 30-day time limit within which an ECC must designate an ECC entity if it wishes to do so. If an ECC entity is not designated, then opportunity for ROFR by the ECC is permanently waived.

Comment 119: The provision at § 680.41(d)(2)(i)(C) requires a statement from an authorized representative of a community that the ROFR has been offered on sale of shares outside a community. Several aspects should be clarified here. First, a signature from an authorized representative is too strict of a requirement. A provision that requires a PQS/IPQ holder that is subject to ROFR to provide notice to ECC entity (and the agency) of the sale is all that should be included here. Otherwise, reluctance to sign the authorization could lead to a delay in the transaction despite proper notice of the sale.

Second, the notice is only required if the sale meets the requirements for the ROFR (*i.e.*, some transfers do not trigger the ROFR). Intra-company transfers, transfers for use in the community, and some transfers of IPQ are not subject to the ROFR. This is not clear from the way the provision is drafted.

Third, somewhere in the regulation the process of completing a sale on which the ROFR is exercised should be stated. Under the Council motion, the EEC entity should notify the PQS/IPQ holder (and agency) of its intent to exercise ROFR (and evidence of its earnest money payment). Then regulations should require confirmation of performance for the agency to finish the transaction. The rule should be changed to only require notice of the transaction to the holder of the ROFR if the proposed transfer is subject to the ROFR. Regulations should be revised to better define the process for exercising ROFR.

Response: NMFS agrees and has changed the final rule at § 680.41(h)(2)(i)(C) to clarify that a holder of PQS/IPQ who wishes to transfer any PQS or IPQ subject to ROFR for use outside an ECC that has designated an entity to represent it in exercise of ROFR, must include an affidavit in the application for transfer stating that notice of the desired transfer has been provided to the ECC entity under civil contract terms enacted under section 313(j) of the Magnuson Stevens Act. The final rule at § 680.41(i)(8) and (9) also has been revised to clarify the process for approval of a transfer application subject to ROFR. In summary, the Regional Administrator will not act upon the application for a period of 10 days. At the end of that time period, the application will be approved pending meeting the general criteria for transfer of PQS or IPQ under § 680.41(i), unless a court order is issued to NMFS to prohibit transfer based on a breech of civil contract terms referenced under § 680.41(f)(3). A 10-day stand down period by NMFS before approval of a transfer should allow sufficient time for an aggrieved signatory to a civil contract for ROFR to obtain a court order to stop a transfer of PQS/IPQ subject to ROFR so that contract terms may be fulfilled through civil court proceedings.

In the case of an application for transfer of PQS within an ECC that has designated an entity to represent it in exercise of ROFR, the Regional Administrator will not approve the application unless either the ECC entity provides an affidavit to the Regional Administrator that the ECC wishes to permanently waive ROFR for the PQS or the proposed recipient of the PQS provides an affidavit affirming the completion of a contract for ROFR that includes the terms enacted under section 313(j) of the Magnuson Stevens Act.

Comment 120: The community of Adak does not receive the ROFR. It should be expressly excluded from ROFR at § 680.41(j)(1)(ii).

Response: NMFS agrees that the community of Adak is not eligible for exercise of ROFR and noted that elsewhere in the regulations. The suggested regulatory clarification has been made to the final rule.

Comment 121: The community does not need to designate an ECC entity. If they do not the ROFR is waived. Change ''must'' to ''may'' at § 680.41(j)(2)(ii).

Response: NMFS agrees that under Amendment 18, an ECC is not required to designate an entity to represent it in the exercise of ROFR and has changed the final rule at § 680.41(l)(2) to clarify that such a designation is discretionary. Any such designation must be made at least 30 days prior to the ending date for the initial application period for crab PQS. If an eligible ECC does not designate an entity within that time period, opportunity to exercise ROFR for transfer of PQS or IPQ will be permanently waived. NMFS notes that an ECC that is also a CDQ community is not required to designate an ECC entity because Amendment 18 specifically states that the CDQ group to which that ECC is a member also will be the ECC entity in the exercise of any ROFR. See also response to comment 111.

Comment 122: Requiring the ECC entity to be a signatory to the transfer at § 680.41(j)(3) is inappropriate and should be removed. A ROFR only requires notice and the opportunity to exercise the right. It may be useful to have PQS holders submit an annual report identifying the amount of IPQ that it used in a community during the year and if used outside a community, who used the IPQ (which would be used to determine whether the ROFR would apply to a future transaction). Require that the transferor provide evidence of notice to the ECC entity.

Response: NMFS agrees that an ECC entity does not need to be a signatory to the transfer of PSQ or IPQ and has changed the final rule accordingly; see response to comment 119. To the extent that information on the use of IPQ within and outside an ECC can be publically released under federal and state data confidentiality standards, NMFS will plan to do so on an annual basis. This commitment does not require a regulatory provision.

Comment 123: The proposed provision at § 680.41(j)(4) seems to confuse the process of passing on the ROFR to a successor. If the transfer is within the ECC, the recipient of the PQS would need to sign a contract granting the ROFR to the ECC organization (not ''exercising the right'') and agree to terms concerning the use of the shares in the community in future years. In addition, the ECC entity need not have signed the contract on application. The submission of the contract signed by the recipient of the shares will allow the agency to deliver the contract to the ECC entity for signature. If the ECC entity does not sign the contract the ROFR would be waived. Revise process for intra-community transfers consistent with the Council motion.

Response: The final rule at § 680.41(i) clarifies the process for transfer of PSQ within an ECC. See response to comment 119. The final rule at § 680.40(f)(3) also was revised to clarify the role of a civil contract for ROFR in the PQS application process. NMFS will not be involved in the completion of these civil contracts. Instead, an application for crab QS or PQS from a person based on legal processing that occurred in an ECC, other than Adak, must also include an affidavit signed by the applicant stating that notice has been provided to the ECC of the applicant's intent to apply for PQS 60 days prior to the end of the application period. If the ECC designates an entity to represent it in the exercise of ROFR in the designated time period, then the application also must include an affidavit of completion of a contract for

ROFR that includes the terms enacted under section 313(j) of the Magnuson Stevens Act. The affidavit must be signed by the applicant for initial allocation of PQS and the ECC entity designated under § 680.41(l)(2). Also see responses to comments 121 and 112.

Comment 124: The provisions at § 680.41(j)(5) defining the ROFR in the North Gulf need to limit the ROFR to the same terms generally as the general ROFR. This means that the ROFR applies only to the first transfer from the community of origin. These terms are not clear in the current regulation. Revise regulation consistent with the Council motion.

Response: The final rule at § 680.40(f)(3)(ii) has been revised to clarify that the civil contracts between the ECC (only the ECC comprised of the City of Kodiak and Kodiak Island Borough is eligible) and applicants for PQS based on legal processing that occurred in the GOA north of a line at 56°20′ N. lat. must adhere to the same terms for civil contracts established under section 313(j) of the Magnuson Stevens Act as the general ROFR contract agreements. Also see response to comment 110.

Comment 125: The cooling off provision allows IPQ to be used inside the borough, if one exists, and inside the first or second class city, if a borough does not exist. The provision at § 680.42(c)(5) appears to limit use of shares outside of the first or second class city in all cases. Revise provision to define boundaries based on Council criteria.

Response: NMFS agrees and has clarified the different definition of ''community'' to which the ''cooling off'' period applies at § 680.42(b)(4) that applies specifically to PQS/IPQ transfers during the cooling off period. See also response to comment 114.

Comment 126: An initial recipient of PQS (*i.e.*, a shore-based processor) must submit a signed community ROFR with his/her application. The proposed rule at § 680.40(f)(3) and (m), does not address what happens if a community fails to establish an entity to negotiate the community ROFR, or otherwise fails to consummate a ROFR deal with the processor during the application period. There is no remedy for the PQS holder, which runs the risk of losing IPQ for the crab year. The Council anticipated this situation and incorporated language in Amendment 18 that states an ECC (both CDQ and non-CDQ) must establish the entity to negotiate the ROFR prior to the application period; otherwise that community loses its ROFR rights. If an ECC does not establish an appropriate entity within 60 days of the initial application period, that community loses its ROFR rights.

Response: NMFS agrees and has changed the final rule accordingly. See response to comments 121 and 111.

Comment 127: The proposed rule's ''affiliation'' standard adversely impacts CDQ groups and eliminates Council-intended community protection. Most, if not all CDQ groups invested in crab harvesting assets, either as partners or sole owners, following passage of the June 10, 2002, Council motion. They did so cognizant of the fact that the motion assigns CDQ groups the community ROFR rights for PQS earned in their communities, as a form of community protection. But the proposed rule's narrow definition of ''affiliation'' undermines the community protection from ROFR rights. ROFR rights are rendered meaningless if a CDQ group exercises its ROFR rights and purchases processing assets to keep them in the community. The CDQ crab harvesting investments become ''processor-affiliated.'' Those CDQ vessels and all that may be indirectly affiliated with them lose their Class B IFQ. They may not join cooperatives under § 680.21. They lose all rationalization benefits, like the vessel cap exemption, leasing rights after 2010, and the right to lease IFQ from a cooperative. The Council never intended this benefit deprivation.

The Council anticipated these sorts of problems and established a context-specific definition of ''affiliation.'' With regard to Class B IFQ, the definition focused on control of landings, not the 10 percent rule that is uniformly applied in the proposed rule. The proposed rule should be modified to reflect Council intent. An affidavit approach re-establishes a functional ROFR process; in the absence of it, ROFR is a meaningless right that offers no community protection.

Response: In response to other comments, NMFS has revised the final rule to allow processor affiliated vessels to join crab harvesting cooperatives and therefore to gain the benefits from participating in crab harvesting cooperatives. See response to comment 84. Further, the definition of ''affiliation'' under § 680.2 has been modified to allow crab harvesting cooperatives or other processor affiliated entities to receive Class A/Class B IFQ in amounts proportional to the amount of IPQ held by the person with whom the QS holder is affiliated. See response to comment 25 for a more specific discussion of this change.

Comment 128: The Council recognized CDQ organizations as the ECCO for CDQ communities, because CDQ organizations are already established to buy, sell and lease QS and other assets in a manner consistent with the NPFMC's intent for this program. Therefore, the rationale for requiring at § 680.41 that a CDQ group apply on behalf of the ECC and also establish a separate ECCO is inefficient and perhaps even inconsistent with Council intent. CDQ groups are already authorized to hold shares for their community(s) and the NPFMC has also given the CDQ groups the right of first refusal. This suggests that the Council motion contemplates a single entity to serve both of these purposes.

Response: NMFS agrees that Amendment 18 contemplates that the CDQ group to which an ECC is a member would serve both as the ECCO for purposes of purchasing and holding PQS or QS and as the ECCO for purposes of ROFR. Given the nondiscretionary nature of this designation, CDQ communities do not need to identify either the ECCO or ECC entity because that ECCO or entity already is specified under the Council's motion and in regulations.

Comment 129: The requirement that a PQS applicant must submit a signed ROFR prior to PQS issuance at § 680.40 (f)(3) and (f)(7) is not practical in cases where the ECC has not established an ECC entity within the appropriate time frame; or where the ECC entity has over-stepped the Council's ROFR terms. The Council specified ROFR contract terms that should be incorporated into the proposed rule. These terms are specific, yet at the same time they do not pose any enforcement liability on the NMFS.

Response. The final rule at § 680.41(l) establishes time limitations for the designation of an ECC entity to represent a non CDQ ECC in the exercise of ROFR. Signed ROFR contracts will not be required to be submitted, only an affidavit that such a contract has been completed consistent with the terms set forth under the Council's motion. These terms have been removed from regulations at § 680.40(m) because they are already set forth specifically in statute and to avoid any inconsistency between regulations and statutory language. Additionally, these contract terms will not be monitored or enforced by NMFS. NMFS is requiring PQS holders to submit an affidavit attesting that the contract has been completed. Also see response to comment 112.

Comment 130: As an ECC, ROFR rights are very important to our community. But the proposed rule at § 680.41(d)(2)(i)(C) does not implement these rights in a manner that is both clear and consistent with the Council motion. We offer these suggestions:

The ROFR provision in the proposed rule requires a statement from an authorized representative of a community that the ROFR has been offered on sale of shares outside a community. This could be a problem. A provision that requires a PQS/IPQ holder that is subject to ROFR to provide notice to ECC entity (and the agency) of the sale is important and necessary; but the signature-requirement is not. An ECCO's reluctance to sign the authorization could lead to a delay in the transaction despite proper notice of the sale.

Also, the notice is only required if the sale meets the requirements for the ROFR (*i.e.*, some transfers do not trigger the ROFR). Intra-company transfers, transfers for use in the community, and some transfers of IPQ are not subject to the ROFR. The proposed rule needs to be more specific in this regard.

Response: NMFS agrees that the ROFR provisions of the proposed rule should be changed to more accurately reflect the intent of the Council and statute provisions of section 313(j) of the Magnuson Stevens Act. The final rule at § 680.41(h)(2)(i)(C) and (i)(8) reflects the recommended changes.

Comment 131: The ROFR requirement was approved by the Council to protect a crab community from losing its processing industry. The proposed regulation establishes a timetable that requires a ROFR contract be submitted prior to the award of PQS. This does not meet the intent of the Council and does not aid in the protection of the community. There may be occasions when the proper community entity simply cannot act in a timely fashion and the processor awaiting PQS is penalized by not receiving PQS due to circumstances completely beyond his control. We believe the regulation should be revised to require that the ROFR be fully executed prior to a holder of PQS completing a permanent sale of his PQS.

The proposed regulation also conflicts with Council intent in that it would require the community group or CDQ group to affirmatively reject the option to purchase. The Council motion required the exact opposite—the Council plan required a community group or CDQ group to affirmatively accept the option. The Council interpretation is critical because it requires the community to take action and will protect from community inaction for any reason. The ROFR requirement in the proposed regulation with regard to leasing is inconsistent with Council intent. The proposed regulation states that the ROFR is required if PQS is leased in excess of one year. The Council test stated that the ROFR arises if the 80 percent of the PQS is leased in any three of five years. The regulation should be revised to reflect that original intent of the Council.

Response: The terms of a civil contract for ROFR have been removed from regulations at § 680.40(m), including the terms associated with leasing of PQS referred to in the comment, because these terms are enacted by statute. This approach also avoids any regulatory conflict with Amendment 18 concerning these terms and conditions. See also response to comment 113.

NMFS has changed the final rule at § 680.40(f)(3) and (f)(7) to require only that an affidavit be signed by the PQS applicant that a civil contract for ROFR has been completed. NMFS will not issue an IAD on unverified claims or issue PQS until such an affidavit is received. The final rule also has been changed so that an ECC entity would not be required to affirmatively reject an option to exercise ROFR. See response to comment 119.

Comment 132: Add the following definition for a non-profit to § 680.2 to clarify the phrase non-profit organization used in the regulations: Non-profit organization means: (1) An Alaskan municipal corporation in a non-CDQ ECC; or (2) a corporation organized under the Alaska Nonprofit Corporation Act. A municipal corporation is not a profit entity. This definition is consistent with the intent of requiring a non-profit organization to serve as the representative of an ECC and provide a community with the option of designating a municipal corporation as the non-profit organization EEC entity for the ECC.

In smaller communities, establishing a limited purpose non-profit entity for the EEC entity will be inefficient. For example, an additional volunteer board would need to be recruited, separate insurance, legal and accounting services would be required, and the rules for participation in the ECC entity and election and meeting procedures would need to be determined. Allowing a municipal corporation would avoid these inefficiencies because all of the organizational infrastructure is already in place within a municipal corporation. Moreover, publically elected officials, who operate in what they feel is in the best interest of the public, would be the final decision makers.

Response: Amendment 18 for community purchase and management of PQS and QS states: ''* * * Ownership and management of harvest and processing shares by community entities in non-CDQ communities will be subject to rules established by the halibut and sablefish community purchase program.'' This program was implemented under the final rule implementing Amendment 66 to the FMP for Groundfish of the GOA (69 FR 23861, April 30, 2004). The proposed and final rules implementing Amendment 18 for community purchase and management of crab QS and PQS are consistent with Amendment 66 provisions. Thus, NMFS believes that the commenter's suggestion is inconsistent with Amendment 18 and would require a subsequent FMP amendment to the Program in the future.

Comment 133: Section 680.40(f) makes it seem that the ROFR can be used on QS purchase and it should be clarified that ROFR can only be used on PQS and IPQ.

Response: NMFS agrees and has changed the final rule accordingly.

Comment 134: Clarify at § 680.41(j)(4) that ROFR does not apply for transfers of IPQ inside an ECC.

Response: The proposed and final regulatory text only refers to applicability of ROFR to transfer of PQS within a community to maintain the opportunity for ROFR contract provisions between an ECC entity and all PQS holders in the community. NMFS agrees that ROFR does not apply to the transfer of IPQ within a community because this activity only is an annual transfer that maintains processing history within the community. NMFS does not believe that regulatory changes are necessary to clarify this point.

Comment 135: The proposed rule at § 680.40(a)(1) stipulates that ''with the exception of the WAI golden king crab fishery, the Regional Administrator shall annually apportion 10 percent of the TAC specified by the State of Alaska for each of the fisheries described in Table 1 to this part to the Western Alaska CDQ Program.'' CDQ groups strongly support this above provision as a community protection measure under the Crab Rationalization program. The increase in CDQ allocations of Crab species from 7.5 percent to 10 percent is consistent with National Standard 8 of the Magnuson-Stevens Act. National Standard 8 includes the requirement that conservation and management measures, consistent with the conservation requirements of the Magnuson-Stevens Act, take into consideration the importance of fishery resources to fishing communities. This standard establishes the goals of providing for the sustained participation of those communities and of minimizing

adverse economic impacts to the extent practicable.

Response: The increase in the allocation of crab TACs to the CDQ Program and the addition of two new CDQ allocations for Eastern Aleutian Islands golden king crab and Adak red king crab are required by section 313(j) of the Magnuson-Stevens Act.

Comment 136: ROFR has distinct characteristics that differ between the ''Cooling Off'' period and after the cooling off period. This is not clear in the proposed rule. If the IPQ holder and the physical processor are in the same community, agency transfer approval should not be required and the activity should not count for purposes of community protections. We believe that the Council intended that use caps and community protections should not be circumvented by the use of custom processing arrangements. We also believe that the Council did not intend to require a formal agency transfer approval for custom processing arrangements in a single community.

Response: NMFS agrees. Amendment 18 clarifies that the ''cooling off provision'' would limit the transfer of PQS or IPQ outside of a community for the first two years of the Program. However, Amendment 18 defines a community for purposes of the ''cooling off'' provision as ''the boundaries of the Borough, or if no Borough exists, the first class or second class city as defined by applicable state statute.'' NMFS incorrectly applied the same geographic boundaries to both the ROFR provisions and the ''cooling off'' provisions at § 680.42(b)(4). The commenter's concern is addressed by modifying § 680.42(b)(4)(iv) to clarify the geographic boundaries to which the ''cooling off ''provisions apply.

Arbitration System

Comment 137: The provisions in the proposed rule at § 680.20(h)(2)(ii)(B), (h)(3)(iii)(C), (h)(3)(iv)(D), and (h)(3)(v) permit IPQ holders to initiate arbitration. Only IFQ holders are permitted to initiate arbitration under the Council's arbitration program. The final rule should limit arbitration initiation to IFQ holders.

Response: NMFS agrees, Amendment 18 and 19 state that the Binding Arbitration procedures can be initiated by the Arbitration IFQ holder only. The reference to the IPQ holder initiating binding arbitration has been removed from § 680.20(h)(2)(ii)(B), (h)(3)(iii)(C), (h)(3)(iv)(D), and (h)(3)(v).

Comment 138: CVC QS holders should not be required to be in Arbitration Organizations in the first three years of the program, as required in the proposed rule at § 680.20(a)(1). In Amendment 18, arbitration is optional for these share holders until July 1, 2008. They could elect to join the arbitration process by joining an Arbitration Organization, but should not be required to join. The final rule should make membership in Arbitration Organizations optional for CVC QS holders prior to July 1, 2008. Additionally, the reference to paragraph (b)(1) at § 680.20(d)(1) of the proposed rule should be clear that CVC QS holders may (not must) join Arbitration Organizations prior to July 1, 2008.

Response: NMFS agrees, CVC QS and IFQ holders may participate in the Arbitration System, but are not required to do so prior to July 1, 2008. This interpretation is consistent with Amendments 18 and 19. NMFS has corrected the final rule at § 680.20(a)(1) and § 680.20(d)(1) to note that participation in the Arbitration System by CVC QS holders is not required prior to July 1, 2008.

Comment 139: The proposed rule at § 680.20(a)(2) should not limit negotiations to the preseason period. Although the process for arbitration states that negotiations should be conducted in the preseason, the purpose of that language is to define the matching of shares for purposes of the arbitration procedure. The regulation suggests that IFQ and IPQ cannot be used if parties do not reach a preseason negotiation. Nothing is lost in the arbitration process from allowing voluntary negotiations between holders of uncommitted shares to occur after the season is begun.

Response: Amendments 18 and 19 state that ''at any time prior to the season opening date, any IFQ holders may negotiate with any IPQ holder on price and delivery terms for that season (price/price formula; time of delivery; place of delivery; etc.).'' Although this statement could suggest that the open negotiation process was anticipated to be limited to the preseason period, the use of the word ''may'' as opposed to ''must'' would allow the process to extend beyond the preseason period. This statement is made under the general heading of ''Last Best Offer Binding Arbitration.'' It is presumed that the limitation on the use of open negotiations would apply to persons who are using the negotiation methods that are established under the Arbitration System (*i.e.*, share matching and binding arbitration), but not necessarily to those IFQ and IPQ holders who are ineligible to use the Arbitration System or to those Arbitration IFQ holders that have not yet committed shares to a specific IPQ holder. Under this revision, an Arbitration IFQ holder that has committed shares to a specific IFQ holder would not be permitted to reenter open negotiations as is expressed under Amendments 18 and 19. However, if an Arbitration IFQ holder has not yet committed shares, open negotiation would be available to that person after the season has begun.

NMFS is revising this portion of the regulations at § 680.20(a)(3) to clarify that if Arbitration IFQ holders choose to use the Arbitration System, they may enter into open negotiation prior to, and during the crab fishing season. Once the season begins, those persons who have committed shares to an IPQ holder would be subject to the limitations established under Amendments 18 and 19. Persons who are affiliated with PQS or IPQ holders would continue to be eligible to use open negotiation after the fishing season has begun.

Comment 140: The word ''uncommitted'' has been omitted in front of IPQ in a few places in the proposed rule at § 680.20(a)(3). Only uncommitted shareholders can negotiate deliveries with holders of uncommitted IFQ.

Response: NMFS agrees that Amendments 18 and 19 are intended to limit the ability to negotiate to uncommitted IPQ holders. NMFS has changed the final rule at § 680.20(a)(2) to clarify this point.

Comment 141: The provision at § 680.20(d)(1)(iv) of the proposed rule permits a person to be a member of only one Arbitration Organization. If a person is only permitted to be a member of a single organization, holders of both IFQ and IPQ cannot meet the requirements of the regulation to be members of separate organizations for IFQ and IPQ. The final rule should be revised to allow membership in one IFQ Arbitration Organization and one IPQ Arbitration Organization.

Response: NMFS agrees that the regulations in the proposed rule do not accommodate the situation of a person who holds both PQS/IPQ and QS/IFQ. The regulations at § 680.20(d)(1)(iv) have been modified to allow a person who holds PQS/IPQ to join only one PQS/IPQ Arbitration Organization, a person who holds Affiliated QS/IFQ to join only one Affiliated QS/IFQ Arbitration Organization, and a person who holds Arbitration QS/IFQ to join only one Arbitration QS/IFQ Organization. This section has been renumbered based on responses to comments, and the text to which the commenter refers is now found at § 680.20(d)(1)(iii) not at § 680.20(d)(1)(iv).

Comment 142: The provision at § 680.20(e)(2)(ii) of the proposed rule requires the use of the ''Share Matching Approach,'' the ''Lengthy Season Approach,'' and ''Binding Arbitration.'' None of these should be required of all participants since arbitration is intended to be voluntary. The regulation requires Arbitration Organization membership and contracts that define the terms that govern arbitration participation. This provision is over broad. The final rule should be revised to state that participants shall engage in arbitration subject to the rules and to the extent specified in the contracts.

Response: The regulations are intended to require that if a member of an Arbitration Organization intends to use the Arbitration System, that member would be required to use the negotiation approaches of open negotiation, Lengthy Season, and Share Matching outlined at § 680.20(h). NMFS agrees that the wording in this regulation may not reflect the intent that members of an Arbitration Organization that choose to use the Arbitration System, may use any of the negotiation approaches that are described at § 680.20(h). Regulations governing the use of the negotiation approaches are already defined at § 680.20(h) and additional contractual requirements on the members of Arbitration Organizations are not required. The regulation at § 680.20(e)(2)(ii) has been removed to reduce confusion and more accurately reflect the Statute.

Comment 143: The provision at § 680.20(e)(2)(v) of the proposed rule is over broad and should be deleted. All information generated pursuant to § 620.20 would require each Arbitration Organization to obtain documents that it and its members have no access to.

Response: The provisions governing the use of information in the Arbitration System is intended to facilitate the ability of uncommitted IPQ holders to communicate to uncommitted IFQ holders the amount of IPQ that may be available. The role of the Arbitration Organizations in this process is to help ensure that information is communicated to their members in a manner that minimizes the potential risks of violating antitrust statutes. The goal of the information exchange is not to place undue burdens on the participants. NMFS agrees and has modified the regulations so that the delivery of information from uncommitted IPQ holders to the uncommitted Arbitration IFQ holders could be accomplished by requiring Arbitration Organizations to hire administrative personnel or contract with a third party data collection agency, that does not have a linkage with either the IPQ holders or IFQ holders, for the delivery of that information to Arbitration QS/IFQ Arbitration Organizations. Arbitration Organizations therefore will not be required to obtain documents that their members cannot see in a manner that requires their members to see them. The regulations in this section have been modified to improve the ability of uncommitted IPQ holders to communicate the amount of shares available through the Arbitration Organizations or through a third-party data collection agent. NMFS has renumbered the regulations based on changes from other comments, and has modified and redesignated the text to which the commenter refers to at § 680.20(e)(2)(iv).

Comment 144: The provisions at § 680.20(e)(2)(v)(B)(*1*) and (*2*) of the proposed rule require the Arbitration Organizations to deliver notices to uncommitted Arbitration IFQ holders. IPQ Arbitration Organizations, however, have no way of knowing who holds uncommitted IFQ. The provisions should be revised so that persons required to deliver notices (1) have access to the names of those required to receive the notice; (2) have access to the information required to be delivered; and (3) are required to maintain confidentiality.

Response: This concern has been addressed by modifying the information distribution system as per the previous comment response in comment 143. However, IPQ holders will not be allowed access to information about who holds uncommitted IFQ. All information exchanges will be subject to existing antitrust laws.

Comment 145: As drafted, the arbitration requires the Arbitration Organizations to deliver several different notices and pieces of information to members that meet certain criteria. The regulation also places strict limitation on the persons who may receive this information (*i.e.*, only holders of uncommitted IFQ are permitted to receive the terms of the arbitration finding or the identities of the holders of uncommitted IPQ that are parties to an arbitration proceeding). The provisions create a paradox under which the persons (or organizations) required to deliver the notices are unlikely to be able to deliver the notices, because no person would be in a position to receive the information that needs to be disseminated or know the identities of the persons that need to receive the information. The regulations could overcome this problem by providing Arbitration Organizations with the ability to hire a third party for the delivery of notices. That third party should be required to be independent of any associations with any IFQ holders or IPQ holders (except for the management of Arbitration Organization notices) and be bound to hold all information received confidential.

Response: This concern has been addressed by modifying the information distribution system. See response to comment 143.

Comment 146: The timeline at § 680.20(f)(4) may not be appropriate for the first year delivery of the arbitration formula. The final rule should allow the same time as permitted at § 680.20(e)(6) for the Market Report.

Response: NMFS agrees. The timeline that has been developed may not adequately address the timing of the fishery in the first year of the program. The best available estimate is that QS/PQS and IFQ/IPQ will not be issued until August 1. In order to make the arbitration system available to the participants in the first year of the program, the timeline for joining an Arbitration Organization, selecting the market analyst, formula arbitrator, and formula arbitrator has been modified so that it will occur after the expected date of QS issuance. NMFS has modified the timelines for the Arbitration System in 2005 at § 680.20(c)(3), (d)(3)(i), (e)(6) and (f)(4) and (g)(4)(viii) as follows:

(1) The deadline for QS and PQS holders to join an Arbitration Organization is August 15, 2005;

(2) The deadline for Arbitration Organizations with members who are QS or PQS holders to submit a complete Annual Arbitration Organization Report is August 20, 2005;

(3) The deadline for the selection of the Market Analyst, Formula Arbitrator, and Contract Arbitrators is September 1, 2005; and

(4) The deadline for the completion of the Market Report and Non-Binding Price Formula is September 30, 2005 or 25 days prior to the date of the start of the crab season for that crab QS fishery.

NMFS understands that this new timeline may be problematic for participants in the golden king crab fisheries which typically begin in mid-August. Given these deadlines, the Arbitration System may not be available to participants in this fishery prior to the start of the season given current season opening schedules.

Consistent with Council intent, IFQ/IPQ will not be issued for this or any other crab QS fishery under § 680.20(e)(7) until the market analyst, formula arbitrator and contract arbitrator have been selected. The extent to which these activities can be

completed by mid August will be dependent upon voluntary cooperation among fishery participants prior to issuance of IFQ/IPQ. The time lines in the final rule are deadlines, but the required activities could occur earlier, thus perhaps allowing for issuance of IFQ/IPQ for the golden king crab fishery by mid August. However, if fishery participants cannot conclude these activities by mid August, their IFQ/IPQ will not be issued prior to the August 15 start date, but CPO IFQ will be available for harvest.

Any concern about different start dates for the CV and CP fisheries may be attenuated by a delayed start date in the golden king crab fishery for the first year of the program. A change in the start date of the fishery is deferred to the authority of the State of Alaska Board of Fisheries, and is not addressed in these regulations.

Comment 147: Section 680.20(h)(3) describes the arbitration procedure. The regulation should also provide that a single binding arbitration proceeding (excluding quality disputes, performance disputes, and the lengthy season approach) is permitted for each IPQ holder per fishery per year. The final rule should include a provision that limits each IPQ holder to a single binding arbitration proceeding per fishery per year.

Response: Amendments 18 and 19 do not provide a specific provision to this effect. However, given the fact that binding arbitration proceedings are limited to arbitration during a five day period that occurs from 15 days prior to the season until 10 days prior to the start of the crab fishing season, the practical effect may be that there is a single arbitration per IPQ holder per crab QS fishery during this five day period. However, this would not preclude additional arbitration proceedings that could arise from a lengthy season approach, quality dispute, or performance dispute. Section 680.20(h)(3) has been modified to note that there can only be one arbitration proceeding for an IPQ holder during this 5-day period.

Comment 148: Section 680.20(h)(3)(ii) generally sets out the process by which arbitration is initiated. Although the commitment of shares is defined in the definitions section of the proposed rule (§ 680.2, Committed IFQ and Committed IPQ), the regulation could be clarified, if the process for negotiated commitments were included here. The final rule should include description of commitment definition at § 80.20(h)(3)(ii).

Response: As the commenter notes, this process is clarified in the definitions section. The regulatory text provides that open negotiation is possible until an Arbitration IFQ holder has committed IFQ to an IPQ holder. Once that commitment has occurred, the IFQ holder is subject to the provisions established under the Lengthy Season approach, Share Matching and Binding Arbitration. The regulations at § 680.20(h)(3)(ii) have been modified to more clearly state that once IFQ are committed, open negotiation is no longer possible.

Comment 149: The provisions at § 680.20(h)(3)(iii) concerning the ''Lengthy Season Approach'' should specify that the adoption of this negotiation/arbitration approach is available only to persons that have committed shares. The final rule should require share commitments for participants to use the lengthy season approach.

Response: NMFS agrees and has modified § 680.20(h)(3)(iii)(A) to note that the Lengthy Season approach requires a commitment of shares by the IFQ and IPQ holder.

Comment 150: The inclusion of the provisions at § 680.20(h)(3)(iii) concerning the ''Lengthy Season approach'' at this point in the regulations adds confusion to the arbitration process. This paragraph primarily concerns the commitment of shares and the process that share holders undertake preceding, and possibly leading up to, Binding Arbitration. The lengthy season approach is an alternative to that standard procedure. The provisions concerning the lengthy season approach should be included in the contract for the Contract Arbitrators, but as a separate provision outside the process description here.

Response: The Lengthy season approach is described as an alternative mechanism to allow for committed Arbitration IFQ holders and committed IPQ holders to negotiate specific contract terms later in the season, or enter into binding arbitration if those processes are unsuccessful. The regulations at § 680.20(h)(3)(iii) have been modified to more clearly state that the Lengthy Season approach is an alternative approach to the standard binding arbitration procedure.

Comment 151: The process for arbitration of the lengthy season approach is not well defined in the Council motion. The regulation at § 680.20(h)(3)(iii) should not attempt to specifically define that process. The regulation should state that industry should define the procedure for arbitration of the lengthy season approach, including the timing of the proceeding and the ability of any IFQ holders to join the proceeding or opt-in to the outcome of the proceeding.

Response: The requirements of when binding arbitration may occur under a Lengthy Season approach provide considerable flexibility to the participants. The regulation has not been modified.

Comment 152: The provision at § 680.20(h)(3)(iv)(B) of the proposed rule requires an arbitration IFQ holder to commit at least 50 percent of the IFQ held to an IPQ holder to make a unilateral commitment. The provision should provide for the commitment of the lesser of 50 percent of the IFQ held and an amount of IFQ that results in the commitment of all the processor's IPQ. In the absence of this provision, a harvester may be unable to commit any IFQ to a processor under the provision because the processor does not hold sufficient IPQ to take most of the harvester's IFQ. In addition, the regulation should consider a lower level than 50 percent for a cooperative to make a unilateral commitment, since a cooperative represents several share holders. A more appropriate threshold might be 50 percent of the average share holding in the cooperative. Revise the provision concerning the minimum commitment. For a cooperative unilateral commitment, a more appropriate threshold might be 50 percent of the average CVO share holding in the cooperative.

Response: Amendments 18 and 19 state that the IFQ offered must be a ''substantial amount'' of the IFQ holders uncontracted (uncommitted IFQ). The 50 percent commitment of shares was based on the assumption that it would represent a substantial amount of shares that a single IFQ holder could commit. NMFS has revised the final rule at § 680.20(h)(3)(iv)(B) to allow for an offer of uncommitted Arbitration IFQ equal to the total amount of uncommitted IPQ available, if that amount is less than 50 percent of the Arbitration IFQ holders uncommitted Arbitration IFQ. Because a cooperative is an association of multiple persons, it is reasonable to reduce the amount of IFQ that a cooperative must commit. Rather than linking this to a percentage of the average IFQ converted by members in the cooperative, a more administratively simple approach would be to require that cooperatives commit at least 25 percent of the IFQ held by the cooperative to an IPQ holder. Because cooperatives are likely to hold larger amounts of IFQ than a single IFQ holder, a 25 percent standard would be a substantial amount of the total holdings of the cooperative, and likely, would be at least equivalent to an

amount equal to 50 percent of any single IFQ holder. This 25 percent threshold for FCMA cooperatives has been added to the final rule at § 680.20(h)(3)(iv)(B).

Comment 153: The time period to initiate arbitration at § 680.20(h)(3)(iv) must be limited on both sides, since only one arbitration proceeding is allowed for each processor. The share matching limit of 25 days before the start of the season is intended to also operate as a limit on the ability to initiate arbitration. In the absence of a limit, a harvester could initiate an arbitration proceeding several months prior to the season, which is unreasonable for all parties including other harvesters that may wish to deliver to that processor. The final rule should limit IFQ holders from initiating binding arbitration more than 25 days prior to the season opening.

Response: Amendment 18 states a Binding Arbitration proceeding must begin ''no later than'' 15 days before the season opening date. The regulations at § 680.20(h)(3) are consistent with Amendment 18 and provide that a Binding Arbitration proceeding may begin at any point prior to 15 days before the start of the crab fishing season, except in the case of Share Matching. NMFS agrees it is reasonable to also include a date before which a harvester could not initiate a Binding Arbitration proceeding to limit a harvester's initiating a Binding Arbitration several months prior to the season. NMFS has modified the final rule at § 680.20(h)(3)(v) to include a requirement that the Arbitration IFQ holder must initiate the Binding Arbitration procedure between 25 days and 15 days prior to the date of the first crab fishing season and a requirement that decisions would need to be issued not later than 10 days prior to the start of the crab fishing season. These requirements would effectively provide a 5-day period during which all arbitration proceedings must be decided.

Comment 154: The provision at § 680.20(h)(3)(v) needs to limit arbitration to holders of shares that are committed to one another. Revise provision so that an IFQ holder may initiate arbitration with an IPQ holder to which the IFQ holder has committed shares.

Response: NMFS agrees and has modified the final rule at § 680.20(h)(3)(v) to more clearly state that arbitration is limited to IFQ and IPQ holders to whom shares have been committed.

Comment 155: The provisions § 680.20(h)(3)(v)(A), (B), (C), and (D), which reference the use of Open Negotiations, the Lengthy Season Approach, Share Matching, and Performance Disputes, do not work here because of the timing of these actions and the timing for initiating arbitration. For example, performance disputes will not arise until during the season, while the arbitration referred to here is limited to preseason. These references should be removed, as the preceding language defining the terms of arbitration are clear. The procedures for the lengthy season approach and performance disputes should be defined in the contract, but not specifically defined in the regulation. Remove the references at § 680.20(h)(3)(v)(A), (B), (C), and (D) to the open negotiations, lengthy season approach, share matching, and performance disputes.

Response: NMFS agrees and has changed the final rule at § 680.20(h)(3)(v) to clarify the issue raised in this comment. Section 680.20(h)(3) applies to the timeframe for initiating Binding Arbitration prior to the season, if an open negotiation process is unsuccessful. It does not apply to the lengthy season approach, performance disputes, or quality disputes.

Comment 156: There needs to be a limit at § 680.20(h)(3)(vi) of the proposed rule on the time during which a person can join an arbitration proceeding in order to prevent parties joining during the proceeding to disrupt the proceeding. Require the contract with the Contract Arbitrator to specify the terms and timing of joining the proceedings.

Response: Amendments 18 and 19 do not specify a time frame by which arbitration proceedings must be initiated. The proposed rule did not specify a particular time during which binding arbitration must be joined, but did note that binding arbitration could be concluded in a fashion so that post-arbitration opt-in could occur. This effectively created the need for an end of arbitration at some point before the end of the season. The contracts that establish the binding arbitration system could include terms that specify a time period during which binding arbitration may be joined. The final rule at § 680.20(h)(3)(vi) has been modified to clarify that the contract with the Contract Arbitrator may specify the terms and timing of joining the proceedings.

Comment 157: The ability to join in a binding arbitration under § 680.20(h)(3)(vi) of the proposed rule should be contingent on the IPQ holder having uncommitted shares and the harvester making a commitment of IFQ. Limit joining by requiring a commitment under § 680.20(h)(3)(iv).

Response: The proposed regulations do not explicitly state that this is the case. The final regulations at § 680.20(h)(3)(vi) have been modified to provide that joining an arbitration requires that uncommitted IPQ be available.

Comment 158: The rationale for requiring separation of the schedule meeting and the meeting defining terms of last best offers, at § 680.20(h)(3)(vii) and (viii) of the proposed rule, is not clear. It may be that antitrust concerns dictate that IFQ holders that are not part of an FCMA cooperative should not participate in a joint meeting. If that is the case, a provision should be added to that effect.

Response: The commenter is correct in that the intent of this provision is to ensure that IFQ holders who are not members of an FCMA should not participate in a joint meeting regarding Last Best Offers. Such joint meetings could increase participant's risk of antitrust violations. The regulations have not been modified, but this response provides the rationale for the structure of the regulations.

Comment 159: The provisions at § 680.20(h)(3)(viii), (ix), and (x) should make it clear that the arbitration will apply to all committed IFQ of the IFQ holder and the corresponding committed IPQ of the IPQ holder. The arbitration outcome should decide the delivery terms of all shares that the parties have committed to one another. Revise to make arbitration apply to and fully binding on all deliveries of committed shares of the parties.

Response: The regulations have been modified to more explicitly state that the arbitration decision will apply to all committed IFQ of the IFQ holder and the corresponding committed IPQ of the IPQ holder. This modification is made in the final rule at § 680.20(h)(3)(x).

Comment 160: Under the provision at § 680.20(h)(5), information flow in binding arbitration is limited to the information submitted by parties and market report and formula. The broad availability of data to IFQ holders under notice requirements and FCMA cooperatives could be argued to create an imbalance in the proceedings.

Response: The flow of information in this program is intended to provide both parties to an arbitration adequate access to information. Information being provided to the Arbitration IFQ holders is intended to facilitate their ability to make a last best offer to that IPQ holder within the time frame required and under the limitations that all IFQ holders would be required to make their

last best offer to the IPQ holder at the same time. The exchange of information does not imbalance the information available to either party to make an adequate last best offer. The regulation has not been modified.

Comment 161: The provision at § 680.20(h)(8) makes reference to (h)(6)(v), which does not exist.

Response: The citation at § 680.20(h)(8) is incorrect and should be a reference to (h)(6). This is corrected in the final rule.

Comment 162: At § 680.20(h)(11)(ii) in the proposed rule, using the same procedure for performance disputes as for other arbitration is not possible because of the timing of arbitration and the timing of performance disputes. The specific process should be defined by industry in the contract with the contract arbitrator. The contract with the Contract Arbitrator should define the process for resolution of performance disputes through arbitration.

Response: The regulation at § 680.20(h)(10)(ii) has been clarified that applicable procedures in the binding arbitration process would apply to a performance dispute arbitration. The regulation clarifies that the contract with the contract arbitrator would specify the time frame for the process. Due to renumbering of this section, the pertinent regulation is now found at § 680.20(h)(10)(ii).

Comment 163: At § 680.20(h)(11)(iii) in the proposed rule, it is unclear how arbitration can be ''unsuccessful''. The reference to ''unsuccessful'' arbitration should be removed or explained.

Response: NMFS agrees and has removed the reference to unsuccessful arbitration at § 680.20(h)(10)(iii). It does not affect the ability of parties to pursue contract remedies if the contract is not met.

Comment 164: Fleetwide arbitration was considered and rejected by the Council in favor of a last-best-offer system built on distinct, independent arbitrations. Yet, the proposed rule § 680.20(h)(3)(i)(D) allows a binding arbitration system that mirrors fleetwide arbitration by violating Council intent concerning the sharing of confidential data. The proposed rule permits a framework in which confidential cost data may be gathered by one harvester Arbitration Organization and shared across all harvester Arbitration Organizations and thus, all harvesters. A single, omnibus FCMA cooperative is allowed to form multiple Arbitration Organizations (AOs), each under the leadership of member(s)—or representative(s)—in-common with the FCMA cooperative. Data pertinent to a bilateral price dispute could be shared back to the FCMA cooperative. The entire membership of the FCMA cooperative would be allowed to see the cost data from all processors. Furthermore, the Contract Arbitrator ''*must receive and consider all data submitted by the parties*'' (*see* § 680.20(h)(4)(iii)), including data that are not germane to the bilateral dispute. Each AO may invoke Binding Arbitration to collect processor cost data rather than resolve price disputes.

There are compelling economic incentives for harvesters to structure such a fleetwide system of mandatory Binding Arbitration in order to capture cost of production data from all processors. This possibility poses a serious antitrust/anti-competitiveness risk. It also clearly violates Council intent that Binding Arbitration is the last resort to resolve failed price disputes.

Sharing of Binding Arbitration data in violation of Council intent is manifest in the proposed rule. For example the Contract Arbitrator is also allowed to share information with parties other than those engaged in the Binding Arbitration, violating the Council's confidentiality requirements. The proposed rule, at § 680.20(h)(6)(iii) requires the contract arbitrator to provide NMFS with confidential information. Yet, Amendment 18 unambiguously stipulates the contrary.

In sum, the proposed rule allows and promotes: (a) Fleetwide Binding Arbitration that was rejected by the Council, (b) sharing of proprietary and confidential data that poses serious antitrust and anti-competitiveness risks, and (c) dispute resolution between two parties based on information regarding disputes between other parties. To resolve this problem, no member common to an FCMA cooperative may be involved in more than two arbitrations (two because of the 50 percent matching rule). This requirement would mean the language at § 680.20(h)(3)(i)(D) must be eliminated or revised to prevent sharing and collecting cost data from multiple processors. More generally, information sharing should be restricted only to the specific parties of the Binding Arbitration, per the Council intent.

Response: The Arbitration System is designed to permit members of an FCMA cooperative to participate cooperatively. Amendments 18 and 19 provide ''[a]ny parties eligible for collective bargaining under the FCMA will be eligible to participate collectively as a member of that FCMA cooperative in binding arbitration.'' Amendments 18 and 19 also provide that ''[a]ll participants to an arbitration shall sign a confidentiality agreement stating that they will not disclose any information received from the arbitrator.'' The rule establishes that members of an FCMA cooperative that are engaged in an arbitration may arbitrate collectively as part of the FCMA cooperative (*see* § 680.20(h)(3)(i)). The Program does not amend the FCMA or existing antitrust laws of the United States. Under the FCMA, cooperative negotiation is permissible. The regulations also require that the contract among the Arbitration Organizations and the Contract Arbitrator require that members of different FCMA cooperatives shall not participate collectively (*see* § 680.20(h)(3)(i)(B)). Of course, if otherwise consistent with the FCMA, two cooperatives could combine to form one cooperative and thereby act collectively. The Arbitration Organizations are not directly parties to a negotiation and therefore would not receive information on particular arbitration proceedings during their negotiation. They would be permitted access to arbitration decisions and on the amount of uncommited IPQ available to facilitate the ability of uncommited IFQ holders to access data.

Cooperatives may negotiate with several IPQ holders, as may individual IFQ holders and a person may enter multiple arbitrations subject to the limitations of the Arbitration System. This type of negotiation is not prohibited under Amendment 18. NMFS disagrees that the rule permits a framework in which confidential cost data may be gathered by one harvester Arbitration Organization and shared across all harvester Arbitration Organizations and thus, all harvesters. Section 680.20(h)(5) establishes limits on the release of data obtained in an arbitration and limits the release of data. Specifically, § 680.20(h)(5)(iv) limits the release of data by persons in an arbitration proceeding to persons who were not party to that proceeding. The proposed rule has not been modified under this particular comment.

Comment 165: The entire Arbitration System in the proposed rule is set up as though it is mandatory, rather than the path of last resort to resolve ''failed price negotiations'', as specified in Amendment 18. As such, it is set up as an analog to harvester-only pricing because everyone is forced in. It is unclear what oversight NMFS will have in this process or why it will or should have any oversight of private arbitrations.

Response: The Arbitration System is established as a mechanism that is

available to IFQ and IPQ holders if open negotiation fails. The Arbitration System requires contractual arrangements among the various parties that may choose to use the Arbitration System. The requirement that QS holders to join an Arbitration Organization is intended to facilitate cost sharing for the program and provide all fishery participants with a market report and non-binding price formula prior to the start of the season. Once a binding arbitration proceeding is entered, the participants are bound to the contractual requirements for the system. These requirements would be enforced through civil contracts. NMFS would be able to receive information on specific arbitration proceedings for purposes of oversight should concerns arise about the potential antitrust implications of particular proceedings or the Arbitration System as a whole. The rule has not been modified.

Comment 166: The binding arbitration procedure described in the proposed rule allows for and provides an incentive for harvesters to join one omnibus FCMA that uses multiple Arbitration Organizations, that could invoke Binding Arbitration for the purpose of securing confidential cost information across all processors, and exert monopoly power, rather than to resolve failed price negotiations. Harvesters would extract maximum rents because they would be able to see all arbitration information across all processors, whereas processors would not be accorded the same privilege. This asymmetry is inconsistent with the zero-risk antitrust concerns expressed throughout the document. Most importantly, such behavior by harvesters would be an antitrust violation.

Response: The Arbitration System limits the release of information received during a particular arbitration proceeding to the parties to that arbitration proceeding (*see* § 680.20(h)(5)). The limit on the release of data ensures that only the parties to an arbitration, that is the Arbitration IFQ holders and IPQ holders that are in an arbitration proceeding, have access to data submitted to the Contract Arbitrator as part of that proceeding. Section 680.20(h)(5) has been modified to explicitly state that persons who are not parties to an arbitration shall not have access to information from that arbitration proceeding, other than the result of an arbitration decision which will be released. This provision is required so that uncommited IFQ holders would be able to participate in post-arbitration opt-in. Under this revision, an ''omnibus'' FCMA cooperative would not have access to an arbitration proceeding unless the omnibus cooperative was directly party to an arbitration proceeding.

If a single FCMA cooperative formed and all members of the cooperative participated in all arbitration proceedings with all IPQ holders, it could be possible for the members of that FCMA cooperative to have access to information from all IPQ holders. If this circumstance did arise, DOJ would have the ability to review the potential antitrust implications of this situation and pursue enforcement actions if necessary. Nothing in Amendment 18 prohibits a cooperative from forming and initiating multiple arbitration proceedings with different IPQ holders. As noted in comment 164, the Program is not intended to amend the FCMA, or other antitrust laws of the United States that permit cooperative negotiations. This is clearly stated in the authorizing language in section 313(j) of the Magnuson-Stevens Act. The rule is not being modified at this time to limit the ability of an FCMA cooperative to participate in multiple binding arbitration proceedings.

Comment 167: Mandatory membership in an Arbitration Organization seems OK if the purpose is solely to initiate timely collection of relevant data that would be needed in the event of an arbitration. It should not be the springboard to easy arbitration. Nothing beyond choosing a Contract Arbitrator should be mandatory, unless a party initiates binding arbitration.

Response: In order for the Arbitration System to function the Market Report and Non-Binding Price Formula must be generated prior to the start of the season. These documents are intended for use both during the open negotiation stage and during any binding arbitration proceedings. The rule has not been modified.

Comment 168: Amendments 18 and 19 give no authority to NMFS to collect confidential, proprietary information. And contrary to the justification given in the preamble, DOJ has no authority to oversee private negotiations. Their authority only arises in the event that one of the parties claims an antitrust violation. Amendments 18 and 19 clearly state that binding arbitration is between private parties and enforced through civil damages. Furthermore Amendment 18 states ''Oversight and administration of the binding arbitration should be conducted in a manner similar to the AFA cooperative administration and oversight.'' There is no similar DOJ oversight under AFA.

Response: The provision of information to NMFS, under § 680.20(h)(6), is not inconsistent with Amendments 18 and 19 and is consistent with the legislation that enacted the Program. Section 313(j)(6) of the Magnuson-Stevens Act provides that NMFS, in consultation with the DOJ and FTC shall develop a data collection program necessary ''to determine whether any illegal acts of anti-competition, anti-trust, or price collusion have occurred among persons receiving individual processing quota under the program.'' This provision has been interpreted to allow the agency to gather information that may be required to assist DOJ and the FTC in their review process. The final rule has not been modified.

Comment 169: The ''fleetwide'' arbitration system was considered and rejected by the Council in favor of the ''last best offer'' system, which is built on distinct, independent arbitrations. Each arbitration is between one IPQ Holder Arbitration Organization and one or more IFQ Holders in an Arbitration Organization, to determine the price and delivery terms for the specific IFQ Shares committed between those quota holders in the share-matching period. Amendment 18 requires information used and exchanged in an arbitration to be kept confidential to the parties and must not be shared outside the arbitration, even within a cooperative. The Council's confidentiality requirement and its rejection of fleetwide Binding Arbitration can be subverted by the data verification standards § 680.20(h)(6)(iii) and (iv) and by allowing multiple Arbitration Organizations to negotiate on behalf of an Omnibus FCMA bargaining cooperative § 680.20(h)(3)(i)(D).

The proposed rule, at § 680.20(h)(5), not only: (a) Allows a fleetwide arbitration by organizing a fleetwide FCMA cooperative that forms multiple Arbitration Organizations, but (b) allows those Arbitration Organizations to negotiate separately with all IPQ Holders. Such a possibility has antitrust implications by allowing the FCMA to collect cost data from all processors involved in binding arbitration. The proposed rule needs to be rewritten to prevent antitrust risk stemming from binding arbitration design/organization.

Response: This comment has been addressed in the responses to comments 164 and 166.

Comment 170: Why are open negotiations, in the proposed rule at § 680.20(h)(3)(ii), limited to the period prior to the season? Why can't negotiations on price and delivery terms occur anytime throughout the season? And why are they limited to

uncommitted IFQ/IPQ? Surely disputes could arise mid-season? Suppose wholesale prices rose dramatically mid-season. Surely all crew would want to re-negotiate contracts, unless the original contract stipulated an automatic adjustment mechanism.

Response: This comment has been addressed in response to comment 148. While it is possible that mid-season disputes could arise and parties would want to renegotiate terms, those terms could be addressed by stipulating that adjustment mechanisms, retroactive payments and the like could be part of the original contract. The rule has not been modified.

Comment 171: The proposed rule language at § 680.20(h)(3)(ii)(B) needs to be revised and clarified. It states ''party to the contract'' may initiate arbitration, yet, no ''contract'' is identified. The proposed rule at § 680.20(h)(1) refer to the bilateral (IFQ and IPQ holders) contract with the Arbitrator. Yet, only an IFQ Holder may initiate arbitration. Does this allow IPQ Holders to do so, and with which IFQ shares? Also, the language ''with all Arbitrators in that fishery'' is confusing. We presume this phrase means that the IFQ and IPQ Arbitration Organizations must choose one Arbitrator from the set of all Arbitrators. If this is the intent, it is unclear. Alternatively, this language could imply fleetwide arbitration, which violates Council intent.

Response: The regulation at § 680.20(h)(3)(ii)(B) has been modified to more clearly state that only the Arbitration IFQ holder may initiate arbitration. An IPQ holder cannot initiate an arbitration proceeding. The regulations at § 680.20(h)(3)(v) have been modified to more clearly state that an Arbitration IFQ holder can select ''a Contract Arbitrator.'' The intent is that only one Contract Arbitrator would participate in each arbitration proceeding.

Comment 172: Revisions are needed to § 680.20(h)(3)(iv)(B) of the proposed rule because the 50 percent share matching requirement was intended to limit frivolous and repeated arbitrations. Under the proposed rule, an omnibus FCMA cooperative can form, which may in turn form multiple Arbitration Organizations, each satisfying the 50 percent matching rule. Then, the omnibus FCMA would enter Binding Arbitration with EVERY processor. This structure would allow every harvester in the FCMA to see every processor's data, thus creating a serious antitrust risk. Furthermore, it creates an incentive to violate the Council intent that Binding Arbitration is the option of last resort to resolve failed price disputes.

Response: The response to this comment was addressed in comment 166.

Comment 173: The proposed rule at § 680.20(h)(3)(iv)(D) suggests there would be two Contract Arbitrators, one for the IFQ holders and one for the IPQ holders? If so, how is one picked to conduct mediation/binding arbitration, if the parties cannot agree? How are bilateral disputes between two contract arbitrators to be resolved? This language needs to stipulate a single Contract Arbitrator is mutually chosen to comply with Amendment 18.

Response: The choice of the Contract Arbitrator(s) is addressed under § 680.20(e)(4) and is conducted prior to the start of the season. The Contract Arbitrator(s) selected for a fishery must be chosen by mutual agreement of the PQS holders and QS holders in the fishery. NMFS has determined that 50 percent of the PQS holders and 50 percent of the QS holders must agree to select the Contract Arbitrator(s). This process is intended to ensure that a pool of mutually acceptable Contract Arbitrator(s) is available for selection if a binding arbitration proceeding begins. The regulations at § 680.20(h)(3)(v) do not state how the Contract Arbitrator for a specific binding arbitration proceeding is selected. The regulations at § 680.20(h)(3)(v) have been modified to establish that the Arbitration IFQ holder would select the Contract Arbitrator subject to terms established in the contract among the Arbitration Organizations and the Contract Arbitrator. Because the Arbitration IFQ holder initiates the binding arbitration process by notifying the IPQ holder and the Contract Arbitrator, the choice of the Contract Arbitrator most appropriately lies with the Arbitration IFQ holder. Otherwise, the initiation of an arbitration proceeding could be delayed.

Comment 174: The proposed rule at § 680.20(h)(3)(v) states that Arbitration initiation must occur more than 15 days pre-season and that either an IFQ Holder or an IPQ Holder may initiate arbitration. Does this occur only after ''share-matching'' has occurred under § 680.20(h)(3)(iv)? If not, how are the IFQ and IPQ shares identified?

Response: The regulations at § 680.20(h)(3)(v) have been modified to state that the Arbitration IFQ holder initiates the binding arbitration proceeding. The timing of a binding arbitration proceeding is after the share matching process. Under the regulations at § 680.20(h)(3)(iv), share matching may begin at any point after 25 days prior to the start of the crab fishing season. The revised regulations at § 680.20(e)(2)(v) establish an information release mechanism that requires uncommited IPQ holders to notify Arbitration IFQ holders of the availability of uncommited IPQ shares. This regulation has been modified to indicate that this notification must occur beginning not later than 25 days prior to the start of the crab fishing season so that the process is in place for share matching. The arbitration process described at § 680.20(h)(3)(v) establishes that the binding arbitration must begin not earlier than 15 days prior to the start of the season. The share matching process would begin first, if the Arbitration IFQ holder and IPQ holder agree on terms then binding arbitration is not necessary, if not then the process established under binding arbitration would begin. The rule stipulates that there would be one arbitration proceeding per crab QS fishery during this initial phase of the arbitration.

Comment 175: The proposed rule at § 680.20(h)(3)(vi) should be revised and clarified to conform to Council intent. It states that any IFQ holder may join an arbitration. How are IFQ holders notified? When may they join—only at the beginning? Does a joining IFQ holder receive any information on the failed price negotiations? From whom? Can a cooperative IFQ holder commit more QS to that arbitration once it has begun? An IFQ holder in failed price negotiations must be limited in an arbitration to the shares it submitted in the share-matching period. The purpose of the share-matching period was to link IFQ holders with IPQ holders so that further negotiations (after the open period) or mediation could take place after the number of IFQ and IPQ were committed. Arbitration would then occur for those shares if mediation failed. The purpose of the requirement at § 680.20(h)(3)(iv)(B) for an IFQ holder to submit at least 50 percent of its shares when doing share-matching was to prevent gaming the system. A cooperative IFQ holder must be limited in share-matching, mediation, and arbitration to the IFQ that it submits to share-matching.

The Council concept is that specific IFQ holders would commit shares to a specific IPQ holder and that those shares were committed to the entire process of share matching, mediation, and arbitration. None of the shares could be removed from that process and no additional shares could join that process. The share-matching period begins only twenty-five days prior to the season opening, and the last day for an arbitration decision is five days before the season. In a twenty-day period, there is no time for adding or subtracting shares from the process. No additional

shares should be added after the share-matching period.

Response: NMFS has modified the final rule at § 680.20(h)(3)(v) based on several other comments to clarify that there is one arbitration process per crab QS fishery prior to the start of the season for each IPQ holder, that an Arbitration IFQ holder with uncommited IFQ may join a Binding Arbitration proceeding, and that an Arbitration IFQ must commit shares in order to participate in the share matching process. The process for an Arbitration Organization or third party to notify the Arbitration IFQ holder of uncommitted IPQ shares that are available for matching is provided at § 680.20(e)(3)(v).

Based on a previous response to comment, NMFS has revised the final rule at § 680.20(h)(3)(x) to require that the arbitration decision is binding on all the committed shares that are applied in the biding arbitration proceeding. The regulations have been modified at § 680.20(h)(3)(vi) to note that once Arbitration IFQ or IPQ are committed to a binding arbitration proceeding they cannot be uncommited to that arbitration. The time frame established under the binding arbitration process limits the ability of Arbitration IFQ shares and IPQ shares to enter this initial arbitration proceeding. Once this binding arbitration proceeding has been completed, uncommited IFQ holders may choose to opt-in and commit their IFQ to the IPQ holder if uncommited IPQ is available under the provisions established at § 680.20(h)(9).

Comment 176: Data confidentiality at § 680.20(h)(3)(iv)(B) is problematic. There is an inconsistency between § 680.20(h)(4)(ii), which says ''The Contract Arbitrator's decision may rely on any relevant information available. * * *'', and § 680.20(h)(4)(iii), which says ''The Contract Arbitrator must receive and consider all data submitted by the parties.'' This broad provision allows submission and mandatory consideration of information about other arbitrations from participants in those other arbitrations. That must not be allowed. It is a clear violation of Council intent that arbitrations are bilateral. The fact that an Arbitration Organization can be engaged in more than one BA, or that one FCMA may be involved in as many binding arbitrations as there are processors in each fishery, implies that the Binding Arbitration might not be based solely on information germane to the bilateral dispute. Under this scenario, an IFQ holder could provide the results of a different arbitration or the information used in a different arbitration (an IFQ holder apparently may participate in more than one arbitration since it could commit 50 percent of its shares to two different processors). An IFQ holder could secure and provide to the Arbitrator any IPQ holder cost data discovered during a different arbitration. There is no justification a Contract Arbitrator is to receive and consider information about other arbitrations or participants in those other arbitrations.

Assurance that data/information used in an arbitration remains confidential to the Binding Arbitration parties is essential but not guaranteed by the proposed rule. Sharing any of that information/data outside the arbitration or within a cooperative must not be allowed. Prevention of this possibility requires that no party invoking Binding Arbitration may be party to more than two binding arbitrations, directly or indirectly (50 percent rule). The proposed rule improperly suggests the Contract Arbitrator may share information and data with other parties § 680.20(h)(4)(iii). This allowance needs to be removed.

Response: Amendments 18 and 19 authorize the Contract Arbitrator to consider information received from the parties to an arbitration proceeding. Amendments 18 and 19 state that ''The [Contract] Arbitrator will also receive and consider all data submitted by the IFQ holders and the IPQ holder.'' The Contract Arbitrator may consider other relevant data as well as data received directly from the parties to the arbitration proceeding as is noted in Amendment 18, the Contract Arbitrator ''may gather additional data on the market and on completed arbitrations.'' The provision in the rule is consistent with Amendments 18 and 19.

Amendments 18 and 19 do not contain specific provisions that limit the ability of FCMA cooperatives to collectively negotiate. In fact, Amendments 18 and 19 state that ''[a]ny parties eligible for collective bargaining under the Fishermen's Cooperative Marketing Act of 1934 (FCMA) will be eligible to participate collectively as a member of that FCMA cooperative in binding arbitration.'' This language indicates the Council intended to allow FCMA cooperative members to negotiate collectively. FCMA cooperatives may share information internally in order to collectively negotiate as an FCMA cooperative in a binding arbitration proceeding.

As noted in previous responses, § 680.20(e)(2)(iii) notes that each member of an Arbitration Organization is required to establish a contract with that Arbitration Organization that requires them to sign a confidentiality agreement with any party with whom they are arbitrating stating they will not disclose at any time to any person any information received from the Contract Arbitrator or another person during the course of a binding arbitration proceeding. This requirement limits the ability of a party to an arbitration to share information gathered during one arbitration proceeding and use it in subsequent arbitrations. This requirement does not restrict an FCMA cooperative or another individual that has uncommitted IFQ from entering into multiple binding arbitration proceedings with multiple IPQ holders. Amendments 18 and 19 do not appear to limit the ability for an IFQ holder to enter into multiple binding arbitration proceedings.

Comment 177: The agency has specifically invited comment on the feasibility of basing the structure of the Arbitration System upon intra-industry contracts. I have strong reservations about whether this system has enough governance structure that it will be capable of making the decisions on selecting Market Analysts, Formula Arbitrators and Contract Arbitrators in a timely fashion. There appear to be too many decision points that require collective decision making on a constrained timely, and no safety net in the event that the necessary governance does not develop spontaneously. Reading the proposed rule, I was left confused and skeptical about how it is all supposed to come together.

Response: The Arbitration System was designed to meet the guidance in Amendments 18 and 19 that would leave many of the specific decisions about the Arbitration System to be established by contractual arrangements. There is the possibility under this Arbitration System that certain elements could not be implemented if parties do not agree. Specifically, the selection of the Market Analyst, Formula Arbitrator, and Contract Arbitrators require an agreement of at least 50 percent of the PQS and 50 percent of the QS holders. If this agreement does not occur, than the Arbitration System could not be used by IFQ or IPQ holders. Because this Arbitration System is considered to be an essential component of the Program as a whole, the final rule at § 680.20(e)(7) stipulates that CVO IFQ, CVC IFQ after June 30, 2008, and IPQ will not be issued for a fishery until the Market Analyst, Formula Arbitrator, and Contract Arbitrators have been selected. This provision would encourage resolution of potential conflicts. The Market Analyst, Formula Arbitrator, and Contract Arbitrators are intended to be

impartial third parties that can analyze fishery conditions and mediate disputes, and mutual agreement of qualified personnel should be possible by cooperative agreements.

Comment 178: The provisions § 680.20(e)(2)(v)(B)(1) and (2) create a paradox under which the persons (or organizations) required to deliver the notices are unlikely to be able to deliver the notices, because no person would be in a position to receive the information that needs to be disseminated or know the identities of the persons that need to receive the information. The provisions should be revised so that persons required to deliver notices (1) have access to the names of those required to receive the notice, (2) have access to the information required to be delivered, and (3) are required to maintain confidentiality.

Response: This comments has been previously addressed in response to comment 145.

Comment 179: The ability to initiate arbitration should rest exclusively with harvester IFQ holders at §§ 680.20(h)(2)(ii)(B), 680.20(h)(3)(iii)(C), 680.20(h)(3)(iv)(D), and 680.20(h)(3)(v). Section 680.20(h)(3)(ii) limits negotiations to ''prior to the date of the first crab fishing season''. Negotiation should be permitted at any time, including after the season opens, as long as participants are not committed to another share holder.

Response: This comment has been previously addressed in response to comment 139.

Comment 180: There are two problems with § 680.20(h)(3)(iv)(B).

(1) This provision requires an arbitration IFQ holder to commit at least 50 percent of the IFQ held to an IPQ holder to make a unilateral commitment. The provision should provide for the commitment of the lesser of 50 percent of the IFQ held and an amount of IFQ that results in the commitment of all of the processor's IPQ. In the absence of this provision, a harvester may be unable to commit any IFQ to a processor under the provision because the processor does not hold sufficient IPQ to take most of the harvester's IFQ.

(2) The regulation should consider a lower level than 50 percent for a cooperative to make a unilateral commitment, since a cooperative represents several share holders. It is quite likely that a cooperative may hold more IFQ than a processor may hold uncommitted IPQ. Further, in attempting to define ''substantial'' there is no grounds for creating a standard that results in a higher absolute quantity for cooperative participants than for individuals. A more appropriate threshold would be 50 percent of the average share holding in the cooperative or the average share holding in the fishery.

Response: This comment has been previously addressed in response to comment 152.

Comment 181: Section 680.20(h)(3)(i)(A) and (B) should refer to ''FCMA crab harvesting cooperatives''. As written it could be interpreted to narrow the otherwise legal ability of more than one FCMA cooperative to act collectively under the shelter of the FCMA. This ability should not be restricted. It should also be recognized that harvesters are eligible to join an ''FCMA marketing cooperative'' whether they are in or out of a ''FCMA crab harvesting cooperative'' and may chose to join an umbrella ''FCMA marketing cooperative'' which holds no IFQ. Such a marketing cooperative simply engages in collective bargaining to the degree allowed by the FCMA, and its ability to do so should not be restricted by these regulations.

Response: NMFS agrees in part. The regulations are not intended to limit the ability of individuals to join FCMA cooperatives to serve different functions. IFQ holders are limited to joining one crab harvesting cooperative for a given fishery, but this is not intended to limit participation in FCMA cooperatives. The limits on FCMA cooperatives participating collectively in a Binding Arbitration proceeding is intended to reduce potential antitrust risks for participants. These restrictions would not limit the ability of a person to participate in an FCMA cooperative for purposes of marketing and still participate in an FCMA cooperative for collective negotiation as long as those two FCMA cooperatives were not collectively negotiating in a Binding Arbitration proceeding. NMFS has modified the regulations at § 680.20(h)(3)(i)(A) and (B) to clarify this point.

Comment 182: The proposed regulation should be amended to provide for separate Arbitration Organizations to be formed by unaffiliated holders of QS; holders of PQS; and affiliated holders of QS. The administrative obligations and responsibilities should be detailed in one location and must be material terms in the binding arbitration agreements.

The terms should require the following;

(1) Select and contract with a market analyst, formula arbitrator, and contract arbitrators;

(2) Establish a fund to pay expenses of these persons which are common to all;

(3) Agreement that IPQ shares and IFQ shares committed during the share matching period or during the arbitration cannot be withdrawn; and

(4) Agreement that all information gathered for the arbitration is strictly confidential to the arbitration and participants may not share any information received from the contract arbitrator with anyone.

Response: The regulations do require the formation of separate Arbitration Organizations by unaffiliated holders of QS; holders of PQS; and affiliated holders of QS (*see* § 680.20(d)(1)). The administrative obligations of the Arbitration Organizations are described under § 680.20(d) and § 680.20(e). These provisions stipulate that contractual agreements must be established among the members of the Arbitration Organization.

Comment 183: Arbitration Organizations should be given the ability to hire a third party for the delivery of notices regarding uncommitted IPQ for Share-Matching, uncommitted IPQ available for arbitration, and notification to uncommitted IFQ holders of the results of arbitrations involving IPQ holders with remaining uncommitted shares.

Response: This comment has been addressed in the response to comment 139.

Comment 184: The proposed regulations provide that a contract arbitrator may receive information from any holder of QS, PQS, IFQ, or IPQ on current ex-vessel prices, market prices, for any products, innovations or other matters, but may not share that information with the participants. The contract arbitrator has access to the Market Report for the fishery, which is essential, and should have access to the non-binding price formula. The non-binding price formula is based on the historic data needed to understand the historic division of revenues between harvesters and processors. These two data sources are adequate supplements to the information provided by the arbitration participants. The contract arbitrator should not have access to information from any sources other than the Market Report, the Non-Binding Price Formula, and the information submitted by the parties. Arbitration decisions based on information unknown or unavailable to the parties will completely undercut trust in the arbitration system and may allow arbitrary information into the proceeding.

Response: The Contract Arbitrator does have access to the information described under this comment. The ability of the Contract Arbitrator to have access to other data is not limited by this rule, but the Contract Arbitrator is required to consider certain standards during the evaluation of the offers made by IFQ and IPQ holders. This approach is supported by Amendments 18 and 19 which state that the Contract Arbitrator ''will gather relevant independently and from the parties,'' and ''will receive and consider all data submitted by the IFQ holders and the IPQ holder.''

Comment 185: Section 680(e)(2)(iii) requires that each party to an arbitration sign a confidentiality agreement with the other party in the arbitration stating they will not disclose to any other person any information exchanged in the arbitration. If one party is a cooperative, the regulation should also require that the information not be disclosed to other members of the cooperative.

On May 18, 2004, Arnold & Porter provided an antitrust memorandum to NOAA recommending several significant changes in the arbitration program. On May 25, NOAA GC forwarded the memorandum and proposed changes to the Council motion for action in June 2004, which was taken. On pp. 26–30 of the Arnold & Porter memorandum, the authors cited strong concerns with information flow in arbitration. They recommended that the arbitrator be prohibited from sharing with the parties any information that he received from persons outside the arbitration. They also recommended a new requirement for a confidentiality agreement which they noted is standard in commercial arbitrations. The recommendations were based on a concern that sensitive pricing and cost information might be shared with or available to competitors.

In the NOAA GC recommended changes to the Council motion, the confidentiality agreement requirement was added. Part of the rationale states that there is a ''* * * risk of antitrust liability if cooperative or members of a cooperative share sensitive competitive information * * *''. Both the Arnold & Porter memorandum and the NOAA GC recommendations point to the possibility of the sharing of sensitive information as a significant antitrust concern. Since it is possible that cooperatives will be formed with large numbers of participants, a single cooperative may be involved in several arbitrations, either in a single year or in succeeding years.

The confidentiality agreement should require that a cooperative protect and partition confidential information within the cooperative so that only those members affected by a specific arbitration receive information from that arbitration. Although an FCMA cooperative is allowed under the antitrust laws to negotiate prices collectively, the FCMA does not condone all activity that might otherwise be in violation of the antitrust statutes. In the crab program's binding arbitration, an IPQ Holder is required by statute and regulation to participate in an arbitration at the sole discretion of an IFQ Holder. As a practical matter, the IPQ Holder must justify its price and delivery offer with cost data if it hopes to win an arbitration. Since the submission of such data is compelled by the program, in practice, every effort must be made to protect the confidentiality of that sensitive data and information.

Response: As the commenter notes, an FCMA cooperative is allowed under existing antitrust laws to negotiate collectively. The ability for an FCMA cooperative to negotiate collectively would be limited if information among members of a cooperative were further limited. The regulations have been modified based on previous comments to clarify that information gained from one arbitration proceeding may not be used in other arbitrations. These regulations are not intended to limit existing antitrust laws. As with all aspects of this program, NMFS, DOJ, and FTC retain the ability to review the conduct of parties and investigate any possible antitrust violations.

Comment 186: Some of the regulations in § 680.20 may be seen as limiting the ability of a non-IFQ holding FCMA Coop to act in behalf of other IFQ holding cooperatives and individual harvesters. Clarification should be given so the legal rights of fishermen provided under the FCMA are not truncated by the regulations of this section. The following text should be inserted: ''Types of cooperatives governed under this section: The regulations in this section pertaining to non-affiliated harvester cooperatives apply only to crab harvesting cooperatives that have formed for the purpose of applying for and of fishing under a crab cooperative IFQ fishing permit issued by NMFS''. Inclusion of this language is consistent with § 680.21 and would help to clarify activities permitted under the FCMA for collective bargaining cooperatives.

Response: The final rule at § 680.20(f), (g), and (h) has been modified throughout those paragraphs to note that the ability of IFQ holders to participate collectively is intended to be limited to those persons who are members of FCMA cooperatives, distinct from the non-FCMA cooperatives that can form for purposes of harvesting IFQ crab.

Comment 187: Arbitration Organizations will incur some cost, perhaps substantial cost, preparing for and executing an arbitration proceeding. The proposed rule at § 680.20(e)(2)(vi)(A)(*4*) provides payment for analysts and arbitrators but does not provide for the sharing of the expenses of the Arbitration Organization initiating the action. Non-member IFQ holders may opt-in to an arbitration result without sharing the full cost of the arbitration. The result is a negative incentive for IFQ holders to support a professional, informed and useful Arbitration Organization. The burden of maintaining such an organization will fall to responsible IFQ holders while freeloaders wait for the smoke to clear and opt-in to the result.

One solution to this problem would be that the opt-in provision would only apply to IFQ holders who belong to the arbitration association directly involved in an arbitration proceeding. IPQ holders can notify other Arbitration Organizations of a proceeding and those organizations can do their own work and bring their own information and price ideas to the table at that time. Their members can then opt-in if they want to. Another alternative would be to allow an opt-in fee set by the arbitrator for IFQ holders who are not members of participant Arbitration Organizations. This alternative may also include opt-ins by affiliated vessels.

Response: The costs for engaging in an arbitration could be significant and NMFS agrees that it would be appropriate to consider fees for any post arbitration opt-in. The regulations at § 680.20(h)(9)(A) note that IFQ holders that opt-in do so under the terms of the arbitrated contract. The arbitrated contract could include a provision that requires a proportional payment of fees for any IFQ holder that opts-in to a completed arbitration contract. Limiting the ability of certain IFQ holders to opt-in based solely on their participation in a specific Arbitration Organization would run counter to the overall intent of the opt-in provisions. The regulations at § 680.20(h)(9) have been modified to state that the Contract Arbitrator may set the fees for the IFQ holder opting-in if those fees have not been determined in the Binding Arbitration contract.

Comment 188: The provision at § 680.20(2)(e)(vii) is important to avoid antitrust violations for Processors, but why is this provision extend to harvester Arbitration Organizations organized as FCMA collective bargaining associations? It is my

understanding that individual IFQ entities may form an Arbitration Organization with one member. Is that member then prohibited from forming a contract on his own behalf? This provision should apply to processor and affiliated Arbitration Organizations only.

Response: The Arbitration Organizations are not permitted to negotiate on behalf of their members to avoid potential complications of allowing associations that are not FCMA cooperatives, and therefore not accorded the antitrust protections of that Act, to negotiate collectively. In the case of an individual who wishes to form his own Arbitration Organization, that individual could still participate in contracts, but the roles of the Arbitration Organization under each contract would be considered separate. If a group of IFQ holders joins an FCMA cooperative and an Arbitration Organization, they could collectively bargain under the name of the FCMA cooperative, but not as the Arbitration Organization. The rule has not been modified.

Comment 189: Under § 680.20(e)(4), can Affiliated QS Arbitration Organizations also select ''one Market Analyst, one Formula Arbitrator, and Contract Arbitrator(s) for each crab QS fishery'' or are they lumped with either harvesters or processors? Since affiliated vessels cannot participate in arbitrations, should they have a voice in the matter? Define role of affiliated vessels in selection of analysts and arbitrators at § 680.20(e)(4).

Response: Affiliated QS holders are not permitted to participate in the selection of the Market Analyst, Formula Arbitrator, or Contract Arbitrator(s) as established under § 680.20(e)(4). Those regulations stipulate that only Arbitration QS holders and PQS holders can participate in the selection of these experts. A PQS holder who also holds QS could not participate in this selection process as a QS holder, but could participate as a PQS holder.

Comment 190: Because an FCMA collective bargaining association may not be a ''harvesting'' entity or an IFQ holder, and QS/IFQ holders are allowed to belong to both a harvesting and non-harvesting cooperative, the arbitrator, at § 680.20(g)(2)(iv), should be allowed to meet with representatives (employees and professional advisors) of the collective bargaining association cooperative or with members of that association.

Response: The regulations require that the contract with the Formula Arbitrator must specify that the Formula Arbitrator may meet with members of any FCMA cooperative collectively and shall meet with distinct FCMA cooperatives separately. These requirements are intended to limit the ability of the Formula Arbitrator to meet with members of more than one FCMA cooperative simultaneously. Nothing in the contract requirements would limit the ability of a Formula Arbitrator to meet with members of the same FCMA cooperative and their representatives (employees and professional advisors) at the same time.

Comment 191: Under § 680.20(3)(i)(b), members of different crab harvesting cooperatives shall not participate collectively unless they are also members of the same non-IFQ holding FCMA collective bargaining association.

Response: NMFS agrees. The regulations have not been modified.

Comment 192: At § 680.20(3)(iv) in the proposed rule, a distinction should by made between individual IFQ and cooperative IFQ share matching commitment. I think the idea here is to disincentive frivolous share matching and ''fishing expedition'' arbitrations, however this provision would restrict the inner machinations of cooperatives whose members wish to harvest ''their own'' IFQ and to match their shares with traditional markets. It is a disincentive to cooperative and the provision should by modified to exclude harvesting cooperatives.

Response: The requirement to commit shares to the IPQ holder has been modified in response to previous comments. Twenty-five percent of the IFQ held by a cooperative would have to be matched. This requirement should permit cooperative members to negotiate internal arrangements adequate for them to establish markets with multiple partners if desired.

Comment 193: Independent harvesters who fail to match shares and form a contract or initiate arbitration prior to the arbitration initiation deadline (15-days before the season) may want to ''cherrypick'' arbitration results for the highest price. However, if a processor has uncommitted IPQ but did not engage in an arbitration proceeding, this ''last man'' harvester is at the mercy of the processor and without recourse. This situation can be avoided by a share matching deadline prior to an arbitration initiation deadline or by eliminating the ''15-day before the season'' deadline for initiating arbitration.

Response: This comment has been addressed in response to comment 153.

Comment 194: How does one initiate a performance dispute arbitration 15 days prior to the season if there hasn't yet been any performance to dispute? Remove deadline for initiating arbitration. In addition, a ''statute of limitations'' restricting performance dispute arbitrations to a reasonable time frame should be included.

Response: The time frame for performance disputes has been addressed in response to comment 155. NMFS agrees, that a time frame may be appropriate, but the specific timing of such a limitation is difficult to determine at this time. The contract terms with the Contract Arbitrator can establish a time-frame for an opt-in provision but that does not require a specific regulatory requirement in the regulations. The regulations at § 680.20(h)(9) have been modified to note that the Contract Arbitrator may specify a time-frame by which opt-in may be exercised for a particular arbitration decision.

Comment 195: A problem with the opt-in provision is that a single arbitration proceeding may result in multiple arbitration results. The opt-ins will want to join the arbitration with the best result. Again, there is disincentive to participate in the process, as it would be beneficial to sit back and select the highest result. In addition, the processor may not be able to accommodate the delivery terms extended to all the opt-ins (for example the plant capacity may not be adequate to handle the amount of crab required to be delivered between two specific dates). In addition, because affiliated vessels are left without recourse to arbitration, they should be allowed to opt in to an arbitration result provided an appropriate fee determined by the arbitrator goes to the harvester Arbitration Organization conducting the arbitration. Restrict opt-in provision to non-affiliated IFQ holders in the same Arbitration Organization. Allow some flexibility for delivery and perhaps other terms as determined by the arbitrator.

Response: The ability of an uncommited Arbitration IFQ holder to opt-in to the best result is precisely what the opt-in provision is intended to allow. As noted in the response to comment 187, the Contract Arbitrator may establish fees for any opt-in contract. Affiliated IFQ holders are specifically excluded from the opt-in provisions based on concerns about increased risks of antitrust violations that may arise if affiliated members participate in price setting negotiations that could result in information being shared among harvesters and processors.

Comment 196: The quality specialist should only determine the quality of the crab, not the price. The quality

specialist may be eminently qualified to make judgments on the quality of crab and at the same time know nothing of crab prices. Section 680.20(h)(12)(ii) should be modified. appropriately.

Response: NMFS agrees. The quality specialist should determine the quality of the crab, but would likely be limited on his ability to comment on prices. NMFS has modified the final rule at § 680.20(h)(11) modified to limit the tasks of the quality specialist to that of determining the quality of the crab. Due to renumbering of this section the proposed § 680.20(h)(12)(ii) is renumbered § 680.20(h)(11)(ii).

Comment 197: The binding arbitration process should be strictly construed to give full effect to applicable antitrust law, and as a result, processor-affiliated harvesters should be prohibited from participating in the arbitration process. Though the Council motion did not prohibit processors and processor affiliates from participating in the binding arbitration process as IFQ holders, it did acknowledge that there were substantial antitrust concerns with such participation and authorized its prohibition to the extent necessary to comport with antitrust laws. The DOJ has already opined that participation by affiliated IFQ holders would violate applicable antitrust law because the binding arbitration process acts as a collaborative price setting mechanism. The prohibition in the proposed rule is therefore appropriate, both as a matter of complying with the mandate of the Council motion and as a preservation of the binding arbitration objectives.

Response: NMFS agrees. Affiliated IFQ holders will not participate in the arbitration process in the final rule.

Comment 198: To the extent the proposed rule restricts the ability of cooperatives to collaborate in the binding arbitration process, it does so inappropriately. Throughout § 680.20, cooperatives are restricted from collectively negotiating and sharing pricing information. Nothing in Amendment 18 prohibits cooperation between FCMA cooperatives. To the extent that the post-arbitration opt-in right is meaningful, it would presumably require knowledge of the arbitration decision, and in many cases, this knowledge will only be acquired on an inter-cooperative basis. Blocking the exchange of information under the guise of antitrust protection only serves to limit the negotiation power of unaffiliated harvesters that have formed FCMA cooperatives to counterbalance the pricing leverage granted to IPQ processors under the Program framework. Under applicable antitrust law, however, cooperatives formed under the FCMA are permitted to engage in marketing activity, both individually and collectively. It is likely that the arbitration process will be deemed marketing activity within the scope of the FCMA cooperative antitrust exemption. Therefore, any prohibition on inter-cooperative negotiation and information sharing contained in the proposed rule should be replaced with a standard that permits such activity to the extent permitted by applicable antitrust law.

Response: The limitations on data exchanges is intended to reduce the potential increased risks of antitrust violations that could occur if information is freely traded among cooperatives that are not engaged in the same negotiations. While it may be the case that inter-cooperative information exchange among IFQ holders that are parties to different arbitration proceedings may not be a violation of antitrust laws, the risk of inappropriate information exchange is increased if this activity is specifically condoned. NMFS has adopted a risk averse policy as it pertains to Binding Arbitration. Information on the availability of uncommitted IPQ shares and the results of any arbitration decisions are made available through provisions at § 680.20(e)(2)(iv). This information exchange mechanism should provide an adequate mechanism to ensure that Arbitration IFQ holders with uncommitted shares are apprised of decisions in a timely fashion.

Comment 199: Membership in an Arbitration Organization should be permissive, not mandatory, and those who opt not to join should be required to remit their portion of the arbitration expense directly to NMFS. Membership on an Arbitration Organization should be permissive because many stakeholders in the Program cannot participate in binding arbitration or may opt not to do so. Eliminating the mandatory membership in Arbitration Organizations will decrease the overall cost of binding arbitration to the fishery, likely resulting in fewer price disputes.

Response: NMFS Disagrees. Amendments 18 and 19 clearly provide that the costs of arbitration are meant to be split among QS and PQS holders. Regulations at § 680.20(e)(2)(vi) establish Arbitration Organizations as a mechanism to ensure that the QS/IFQ and PQS/IPQ holders coordinate in the selection and the payment of the Market Analyst, Formula Arbitrator, and Contract Arbitrator. These costs are shared by all QS/IFQ and PQS/IPQ holders because the results of the Market Report, Non-Binding Price Formula, and the Contract Arbitrator are available to all fishery participants. The costs of entering a lengthy season approach, share matching, Binding Arbitration, quality and performance disputes are established through the Arbitration Organizations. The Arbitration Organizations may establish methods for assessing increased fees to IFQ or IPQ holders that use a lengthy season approach, share matching, Binding Arbitration, quality and performance dispute mechanisms relative to other IFQ or IPQ holders that do not use those mechanisms. The specific method for sharing fees among the IFQ and IPQ holders may be determined by negotiation among the various Arbitration Organizations.

Comment 200: Consistent with the assertion that membership in Arbitration Organizations should be voluntary, the requirement at § 680.20(e)(vii) that transfer of QS, PQS, IFQ or IPQ be conditioned on the transferee's membership in an Arbitration Organization should be eliminated. This provision creates a condition to transfer eligibility that is dependent on resolution of private contract negotiations. To the extent negotiation of Arbitration Organization documents are contentious, this requirement diminishes the negotiating power of individuals in a position to receive QS or IFQ by transfer. Moreover, because this provision conditions the transfer of a Federal harvesting privilege on acts beyond the control of either the applicant or the agency, it is fundamentally unreasonably and unfair.

Response: The intent behind this provision was to ensure that if QS/IFQ or PQS/IPQ is transferred after the Annual Arbitration Organization Report or the start of the season that the recipient of that QS/IFQ or PQS/IPQ has fulfilled the requirements necessary in order to participate in the Arbitration System, including the payment of fees. The commenter is correct in that this requirement could limit the ability of transfers to occur and does condition the transfer on the transferee meeting certain private contractual arrangements. If a person receives QS/IFQ or PQS/IPQ by transfer, there is no requirement that they are members of an Arbitration Organization. NMFS agrees that this transfer restriction as a contract term is not well-suited to meeting these goals. NMFS is revising the regulations to delete this provision and adding a provision at § 680.20(c)(4) that requires that if a person receives QS/IFQ or PQS/IPQ by transfer they are required to join an Arbitration Organization upon transfer. Payment of fees or other cost sharing measures could be established

by the Arbitration Organization for any new members.

Comment 201: For the purpose of share matching under § 680.20(h)(3)(iv)(B), a cooperative's offer to match up uncommitted Arbitration IFQ should be deemed substantial if it is 50 percent or more of the average individual IFQ holder's remaining uncommited Arbitration IFQ, not 50 percent or more if the cooperative's total uncommited Arbitration IFQ. The proposed rule required that a cooperative seeking to commit Arbitration IFQ make an offer of at least 50 percent of that cooperative's uncommited Arbitration IFQ. Because this requirement is beyond that expressed in the Council's motion, and because it would decrease the marketability of a cooperatives IFQ and its ability to take advantage of the arbitration process, the proposed rule should be modified to better comport with the Council's intent. And, because the Council's motion focuses on the substantiality of an individual's offer to match up uncommited Arbitration IFQ, the proposed rule should permit cooperatives to meet this substantiality requirement by making an offer to commit Arbitration IFQ in an amount that is equal to 50 percent or more of an average individual IFQ holder's uncommited Arbitration IFQ.

Response: This response has been addressed in the response to comment 152.

Comment 202: In the case of binding arbitration at § 680.20, there is good reason to apply greater restrictions on processor interest than apply elsewhere. The reason is that the exchange of information contemplated by the arbitration process is necessary to its effectiveness, but also an invitation to abuse, if made open to processors.

Response: The regulations regarding information exchange in the Arbitration System are intended to minimize antitrust risks to participants in the system while facilitating the exchange of information.

Monitoring and Enforcement

Comment 203: The additional requirements for CPs at § 680.23 will add undue costs to a system that already works. Finding additional space aboard a CP for larger floor scales in the observer area will be problematic, if not impossible. NMFS should adopt the following procedure:

Each day the observer on board the vessel will periodically take a sample and this crab will be held separately. The observer will record the number and total weight of the crab, This crab will be processed separately each day and the observer and foreman will be available to verify the actual recovery rate of finished product. After 75 percent of the trip is complete, the observer and foreman will agree on an overall recovery percentage and both will sign a statement noting this rate and the process used to arrive at this rate. The final round weight to apply against the IFQ can be determined by taking the total net box weight and dividing it by the agreed upon recovery rate.

Response: NMFS disagrees. The method described by the commenter would put additional burden on the observer and would require NMFS to specify observer duties in regulations. Because the State of Alaska is responsible for setting levels of observer coverage and training, NMFS is not able to base a catch accounting system on presumed levels of observer coverage, nor does NMFS believe it is appropriate to specify observer duties in regulation.

Comment 204: The requirement for CPs to have internet connectivity at § 680.5(b) as part of interagency electronic reporting system is unreasonably burdensome on CPs for two reasons. First, the technology for reliable at-sea internet connectivity is not yet perfected and may not work in certain sea conditions. These vessels are relatively small by comparison to large trawl vessels and are not well suited to reliable data transfer by satcom internet due to the ship's motion. Second, there is a well tested and reliable data transfer system in place by text over satellite communications systems, and weekly production reports are now transferred in this fashion. Considering the expense and potential for unreliability, CPs should be allowed to report catch data using existing sat-com systems as used in WRPs.

Response: NMFS agrees. It was not NMFS' intent to require CPs to submit catch reports over the internet. This final rule amends the regulations at § 679.5(d)(2)(ii) to clarify that CPs are not required to use the Interagency Electronic Reporting System and may use other, NMFS approved, means of reporting catch.

Comment 205: The requirement at § 680.5(c)(2) to report daily catch for CPs is unreasonably burdensome and without good purpose. Daily reporting of crab catch is not required of the catcher vessel component of the fleet, reporting is at delivery or landing. Managers will not be using daily catch reports from CPs to manage the fishery but will assume that individual CP catch will be limited to the amount of IFQ they hold. WPRs, offload reports, and transfer logs will be required at the point of delivery. These will be sufficient for managers and regulators to monitor the activity of the CP sector. Replace a daily catch reporting requirement for the CP fleet with a requirement for weekly report as required in other federal fisheries.

Response: NMFS agrees and has amended the final rule at § 680.5(d)(4) to require weekly, rather than daily, catch reporting for CPs. NMFS notes, however, that this change does not relieve the burden upon CPs to accurately account for catch internally on an ongoing basis.

Comment 206: The Council Motion recognized that onboard observer requirements for the BSAI crab fisheries should remain deferred to the Alaska Board of Fisheries, as prescribed in the FMP. Therefore, descriptive and regulatory language at § 680.23(h) of the proposed rule, regarding requirements for the provision of observer work stations, should be removed. If these provisions of the regulations, as written, are adopted into regulation, then every time the Alaska Board of Fisheries makes a regulatory change through its cyclic public process, a duplicative or parallel complimentary Council action would be required.

Response: NMFS disagrees that Amendment 18 prevents NMFS from implementing standards for observer work areas. While Amendment 18 does defer observer coverage to the State of Alaska, NMFS is responsible for ensuring that quotas are adequately monitored and reported. NMFS does not believe that Amendment 18 prevents NMFS from implementing regulations to adequately monitor and account for catch simply because they benefit or involve the observer.

However, NMFS agrees that duplicative regulations could be confusing and create potential regulatory conflict and such duplicative regulations could be created in the event that the State of Alaska implements regulations governing working facilities for observers on CPs. Further, catch accounting for CPs is based on not only on the round weight of crab as verified by the observer at-sea, but also upon a full accounting of product when the crab is landed. Although NMFS believes that catch accounting accuracy could be improved by implementing standards for the observers' work areas, NMFS concurs that the State should have the opportunity to address this issue. NMFS will revisit the situation in the future to determine whether additional regulations governing observer's work areas are necessary.

Comment 207: The requirement to land product processed on board at a

shoreside location in the U.S. accessible by road or regularly scheduled air service should be modified to specifically identify the port of Adak as a designated port. While Adak has regularly scheduled air service at this time, that may change. It is important to golden king crab CPs to have the ability to off-load product at the Adak port, rather than being forced to travel to Dutch Harbor to off-load.

Response: NMFS disagrees. There is no reason to suppose that Adak is any more likely to lose regularly scheduled air service than other small communities, such as Akutan, Sand Point, King Cove, or Saint Paul where crab product may be offloaded. All of these communities have received essential air service determinations from the Department of Transportation and are eligible to receive subsidized air service. In the unlikely event that a community where crab product had been offloaded for accounting were to lose regularly scheduled air service, NMFS would work closely with the affected vessels to ensure accurate and affordable catch accounting.

Comment 208: A product recovery rate should be an option instead of scales to weigh the catch. This is particularly true for smaller CPs that will have difficulty in installing the scales, due to space constraints and cost. The initial estimated cost of $100,000 or more will be a significant financial hardship for the small vessel to absorb. The ability to have a product recovery rate established is available and NMFS should move forward with an analysis of this important issue.

Response: NMFS intends to further investigate recovery rate based accounting. However, at this time NMFS does not believe that a recovery rate accounting system is appropriate for several reasons. First, recovery rate data exist only for very short periods of the year and only for certain areas. Under a rationalized fishery, NMFS anticipates that fishing will take place during a much longer season and data are not available to predict the extent to which a change in fishing time or area will affect recovery rates. Second, recovery rates vary among vessels for numerous reasons. Most importantly, some vessels glaze crab prior to final packaging while others dry freeze the crab. NMFS would need to either develop seasonal rates, vessel specific glaze rates, or publish rates based on an absence of glaze. Such rates would unfairly debit quota from those boats that do glaze their finished product. Third, any recovery rate based accounting system would require observer coverage levels designed to ensure accurate accounting and an observer training program. Finally, a rate-based accounting system would require development and specification of product recovery rates. Such a process would needlessly delay implementation of this action.

Comment 209: Where are the provisions to catch violators, fine them and jail them? Measures are necessary to prevent harvesters from catching more that they report to NMFS.

Response: NMFS agrees that enforcement is an important component of ensuring compliance with fishery regulations, and, therefore, NMFS has implemented monitoring and enforcement measures for this Program. NMFS believes the fines and other sanctions available under the Magnuson-Stevens Act are sufficient to deter unlawful activity.

Comment 210: The definition of Processing at § 680.2 should specifically state that deliveries for the purposes of live shipping are allowed. Crab delivered for the purpose of live shipment are not suitable for consumption or storage. In addition, live shipping is not considered ''processing'' as defined by the USCG. The intent is to continue to allow all typical pre-rationalization product forms.

Response: None of the regulations in this rule preclude any crab product form, including live crab, from being produced or shipped. The regulations require that all crab harvested by catcher vessels be landed at, and accounted for by, an RCR. This accounting must take place at the time of offloading and before any processing has taken place. After accounting, the receiver of the crab may ship the crab on in their unprocessed form or produce any product they wish. NMFS' definition of processing is designed to prevent a harvesting vessel from producing a crab product that is suitable for long term storage or whose weight would be different than live, whole crab before that crab has been properly accounted for at the time of landing or, for CPs, reporting.

Comment 211: The current proposed harvest overage cap of 3 percent is too low and places harvesters at a disadvantage. The overage cap should be increased to 5 percent.

Response: The harvest overage provision of 3 percent is a provision of Amendment 18. Section 313(j) of the Magnuson-Stevens Act requires NMFS to implement the Program provisions in Amendment 18. NMFS does not possess the discretion to alter the harvest overage provision as it exists in statute. Any change to the harvest overage provision requires an amendment to the Program and should be addressed with the Council.

Comment 212: Concerning fishing overages, any overage of three percent or less of the ''last trip'' should be forfeited, with the proceeds to be dedicated to the observer program. Additional sanctions for overages above three percent may be necessary. Further a post-delivery harvester QS transfer process should be developed to accommodate in-season overages.

Response: See Response to comment 18 (post-delivery transfers) and 213 (IFQ overages). Amendment 18 does not direct how penalties will be administrated or resolved for any IFQ overages. Nonetheless, NOAA does not have the authority to provide proceeds from any seizures resulting from a violation to any agency other than NOAA. Therefore, NOAA cannot forward any proceeds from IFQ overage seizures to the State of Alaska observer program.

Comment 213: The Council motion provides for the forfeiture of any overage from the last trip from a fishery and for penalties for any overage in excess of three percent of the unused IFQ on the last trip. These provisions appear to be missing from the regulation. The final rule should clarify that all overages are forfeited and that overages in excess of three percent are a violation.

Response: See Response to Comment 18 on post-delivery transfers. NMFS agrees that Amendment 18 states, ''Overages up to 3 percent will be forfeited. Overages above 3 percent results in a violation and forfeiture of all overages.'' However, as a general policy, NMFS does not include penalties schedules in regulation. Therefore, NMFS has not included any regulatory language addressing overages and this discussion serves to inform the public of their rights and obligations regarding overages that occur during the last fishing trip.

The Council did not provide a carryover provision in this Program similar to the halibut and sablefish IFQ program and harvesters are prohibited from exceeding their IFQ. Thus, NMFS interprets that any overage of any allocation under the program is a violation. This means that NMFS will address any overage through an enforcement action. The is necessary because the Magnuson-Stevens Act requires that a violation must exist in order for NMFS to seize any crab or the proceeds from any crab.

NMFS also interprets the 3 percent statutory provision as a minimum standard by which penalties would be levied under the Program and additional

Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 8, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

Appendix Issues in Decision Memorandum

Comment 1: Whether Jindal Polyester Limited and Valencia Specialty Films Were Affiliated During the First Three Months of the Period of Review

Comment 2: Whether Jindal and Valencia Were Affiliated During the Remainder of the Period of Review

Comment 3: Whether it is Appropriate to Apply Partial Adverse Facts Available

Comment 4: Whether the Department Applied the Appropriate Adverse Facts Available Rate

Comment 5: Whether Jindal Polyester Limited Properly Classified Certain Merchandise as Non–prime Merchandise

Comment 6: Whether the Department Incorrectly Converted the Currency of Certain Movement Expenses

Comment 7: Whether the Department Incorrectly Calculated Home Market Billing Adjustments

Comment 8: Whether the Department Incorrectly Calculated the Net Home Market Price

Comment 9: Whether the Department Should Offset its Calculations for Negative Dumping Margins

Comment 10: Whether to Increase the Price of Certain U.S. Sales by Countervailing Duties Imposed to Offset Export Subsidies

[FR Doc. E5–658 Filed 2–16–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Alaska Region Vessel Monitoring System (VMS) Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before April 18, 2005.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Patsy A. Bearden, 907–586–7008 or *patsy.bearden@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

NMFS Alaska Region manages the U.S. groundfish fisheries of the Exclusive Economic Zone (EEZ) off Alaska under the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Management Area (FMPs). The North Pacific Fishery Management Council prepared the FMPs pursuant to the Magnuson-Stevens Fishery Conservation & Management Act. The regulations implementing the FMPs are at 50 CFR part 679.

The recordkeeping and reporting requirements at 50 CFR part 679 form the basis for this collection of information. NMFS Alaska Region requests information from participating groundfish participants. This information, upon receipt, results in an increasingly more efficient and accurate database for management and monitoring of the groundfish fisheries of the EEZ off Alaska.

II. Method of Collection

Internet and facsimile transmission of paper forms. Paper applications, electronic reports, and telephone calls are required.

III. Data

OMB Number: 0648–0445.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Not-for-profit institutions; and business or other for-profit organizations.

Estimated Number of Respondents: 539.

Estimated Time per Response: 6 hours to install a VMS; 4 hours per year to maintain a VMS; 5 seconds for an automated position report; 12 minutes to fax a check-in report; and 12 minutes to fax a reimbursement form.

Estimated Total Annual Burden Hours: 13,152.

Estimated Total Annual Cost to Public: $491,000.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: February 10, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–3033 Filed 2–16–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Atlantic Highly Migratory Species Permit Family of Forms

AGENCY: National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.